

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-129

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE, etc., et al.,

Appellants,

—v.—

NEW YORK, et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Chronological List of Relevant Docket Entries

- December 3, 1971—Plaintiff's original complaint filed in the U.S. District Court for the District of Columbia.
- December 16, 1971—Plaintiff's amended complaint filed.
- March 10, 1972—Defendant's answer filed.
- March 17, 1972—Plaintiff's motion for summary judgment filed.
- April 4, 1972—Defendant's consent to summary judgment filed.
- April 7, 1972—Applicant's motion to intervene filed.
- April 12, 1972—Order of the District Court entered, denying motion to intervene and granting motion for summary judgment.
- April 24, 1972—Applicant's motion to alter judgment filed.
- April 25, 1972—Order of the District Court entered, denying motion to alter judgment.
- May 11, 1972—Notice of appeal filed by applicants for intervention.
- November 6, 1972—Jurisdiction postponed.

Amended Complaint
(Filed December 16, 1971)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Index No. 2419-71

NEW YORK STATE on behalf of **NEW YORK, BRONX and
 KINGS COUNTIES**, political subdivisions of said State,
Plaintiff,

—against—

UNITED STATES OF AMERICA,

Defendant.

**AMENDED COMPLAINT FOR DECLARATORY JUDGMENT
 UNDER THE "VOTING RIGHTS ACT OF 1965" AND THE
 "VOTING RIGHTS ACT AMENDMENT OF 1970"**

1.

This is an action for a declaratory judgment arising under Section 4(a) of the Voting Rights Act of 1965, Public Law 89-110, 70 Stat. 438; 42 U.S.C. § 1973b as amended by Public Law 91-285, 84 Stat. 315, and is brought pursuant to 26 U.S.C. § 2201 for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

2.

The plaintiff, New York State, is one of the sovereign states of the United States of America. New York, Bronx

Amended Complaint

and Kings Counties, are duly constitutional counties of the State of New York; they are political subdivisions of said State within the meaning of that term as used in the foregoing section authorizing actions for declaratory judgment by a state or subdivision thereof.

3.

The State of New York requires certain qualifications for registration and voting. Section 150 of the Election Law, prior to and since 1961, has required that a "new voter except for physical disability", be able to read and write English. Section 168 of the Election Law provides for the giving of literacy tests or for the presentation of evidence of literary in lieu of such test.

4.

Section 168 of the Election Law provides that in lieu of taking a literacy test,

"(A) new voter may present as evidence of literacy a certificate or diploma showing that he has completed the work up to and including the sixth grade of an approved elementary school or of an approved higher school in which English is the language of instruction or a certificate or diploma showing that he has completed the work up to and including the sixth grade in a public school or a private school accredited by the Commonwealth of Puerto Rico in which school instruction is carried on predominantly in the English language. . . ." Election Law § 168 as amended L. 1965, c. 797, eff. July 16, 1965.

After the enactment of the federal "Voting Rights Act of 1965", the New York City Board of Elections provided

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English-Spanish affidavits to be executed by new voters in lieu of a diploma or certificate in conformity with the requirements of said Act.

5.

Sections 150 and 168 of the Election Law are statutory enactments of the constitutional requirement for qualification for registration prescribed by Article I, Section 1 of the Constitution of New York, which provides, in pertinent part:

"Sec. 1. [Qualifications of voters] * * * *, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English."

The literacy requirement imposed by the New York State Constitution and Sections 150 and 168 of the Election Law have not been held to be violative of the United States Constitution by any Courts.

6.

The literacy tests are made up by the Division of Educational Testing in the State Education Department and are administered by personnel of the Board of Elections during central registration and by examiners designated by the Board of Education of the City of New York during the period of local registration. Several different test types were administered each year and each test was a simplified test to determine literacy with absolutely no intention or effect as a device or test to abridge or deny the right to vote on the basis of race or color.

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7.

The literacy requirements described in paragraphs 3 and 4 above were suspended in 1970 and remain suspended pursuant to the mandate in the Voting Rights Act Amendment of 1970 (84 Stat. 315; 42 U.S.C. § 1973, *et seq.*).

8.

By letter to the Governor of the State of New York dated July 16, 1970, the Attorney General of the United States, acting pursuant to the authority conferred by the Congress of the United States in Public Law 89-110, 79 Stat. 437 (Voting Rights Act of 1965), and Public Law 84 Stat. 314 (Voting Rights Act Amendment of 1970), advised of his determination that the provisions of the election laws of New York as hereinabove set forth constituted a "test or device" within the meaning of the Act.

9.

On March 27, 1971, there was published in the Federal Register (36 Fed. Reg. 5809) a determination by the Director of the Bureau of the Census that less than 50 per cent of the persons of voting age residing in Bronx, Kings and New York Counties in the State of New York, voted in the presidential election of 1968.

10.

Upon publication of the aforesaid determination by the Attorney General and the Director of the Census in the Federal Register, the remedial sections of the Voting Rights Act of 1965 and the Voting Rights Act Amendments of 1970 automatically became applicable to the named counties, requiring that all changes in voting qual-

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ification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968 be submitted to the Attorney General of the United States.

11.

No test or device within the definition of those terms as used in Section 4(c) of the Voting Rights Act of 1965 or the Voting Rights Act Amendment of 1970, including the tests provided for under Section 168 of the Election Law of New York aforesaid have been used by the plaintiffs during the ten years preceding the filing of this action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. There have been no final judgments of any court of the United States within ten years preceding the filing of this action determining that denials or abridgements of the right to vote on account of race or color through the use of tests or devices have occurred anywhere within the territory of New York, Bronx or Kings County, in the State of New York.

12.

In 1968, there were 4,445 literacy tests conducted in New York County in which 4,299 persons passed and 146 or 3.3% failed; in Bronx County, 2,396 tests were conducted in which 2,286 persons passed and 110 or 4.8% failed; in Kings County, 3,733 tests were conducted in which 3,560 persons passed and 171 or 4.6% failed. With respect to the results for the literacy tests given for the years 1961 through 1969, see Exhibit "1", annexed hereto.

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13.

At the time of the election in November, 1968, there were 630,382 registered voters in New York County; 527,742 registered voters in Bronx County; and 957,880 registered voters in Kings County. In New York County, 553,629 or 87.8% of the registered voters voted in the election; in Bronx County, 465,475 or 88.2% voted; and in Kings County, 810,640 or 84.6% voted.

14.

The percentage of the voting age population who voted for President in 1968 was determined by the Bureau of the Census to be 45.7% in New York County; 47.4% in Bronx County; and 48.4% in Kings County. These percentages were based upon an interpolation from the 1960 and 1970 census establishing a population of 1,159,004 in New York County, 938,482 in Bronx County; and 1,672,151 in Kings County. The percentages were based upon the number of votes cast for President and did not give credit to the persons who voted in the general election, but did not vote for President. Thus in New York County, there were 24,089 unrecorded votes; and in Kings County, 35,573. If these unrecorded votes had been included in the figures used by the Census Bureau, the percentage of voting age population who voted in the 1968 election would be in New York County 47.7%; Bronx County, 49.6%; and Kings County, 48.5%.

15.

Registration is conducted centrally throughout the year in each of the Counties at the office of the Board of Elections. The hours are Monday through Friday from 9 A.M.

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to 5 P.M. and Saturday from 9 A.M. to 12 noon. Beginning in 1964 and continuing through 1971, there have been voter registration drives conducted in the summer of every year, except 1967 in each of the named counties designed to increase the number of registered voters. The number of voters registered is set forth in Exhibit "2", annexed hereto. Considerable sums were expended on the registration drives. The central and branch registration was, in addition to the local registration, conducted throughout each county at the regular polling places during the beginning of October of every year.

16.

The failure of any person to register and vote in the Counties of New York, Bronx and Kings is and was in no way related to any purpose or intent on the part of the officials of those counties or the State of New York to deny or abridge the right of any person to vote on account of race or color; the named counties and the State of New York have in the past and will in the future assist and encourage the full participation by all of its citizens in the affairs of government.

WHEREFORE, plaintiff asks for the convening of a three-judge court pursuant to 42 U.S.C. § 1973b(a) and 28 U.S.C. § 2284 and that such court grant a declaratory judgment in this cause adjudicating and declaring that during the ten years preceding the filing of this action, the voter qualifications prescribed by the State of New York, hereinabove referred to have not been used by the Counties of New York, Bronx and Kings, subdivisions of the State of New York, for the purpose or with the effect of denying or abridging the right to vote on account of race or color,

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and that the provisions of Sections 4 and 5 of the Voting Rights Act of 1965 as amended by the Voting Rights Act Amendments of 1970 are therefore inapplicable in and to the Counties of New York, Bronx and Kings in the State of New York, and for such other and further relief as to the Court may seem just in the premises.

Dated: New York, New York
December 16, 1971

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Plaintiff
By

JOHN G. PROUDFIT
Assistant Attorney General
80 Centre Street
New York, New York 10013
Telephone No. 488-3285

Exhibit "1"

LITERACY TEST RESULTS SINCE 1961

YEAR		NEW YORK	BRONX	KINGS
1961	Total	3607	2404	3502
	Passed	3076	2122	3090
	Failed	531	282	412
1962	Total*	6874	4691	6010
	Passed	6159	4223	5394
	Failed	711	464	616
1963	Total*	7113	4716	7462
	Passed	6277	4086	6644
	Failed	799	619	817
1964	Total*	6265	3977	6400
	Passed	5644	3833	5626
	Failed	621	144	774
1965	Total*	1576	1737	2391
	Passed	1400	1502	2133
	Failed	176	235	258
1966	Total*	1678	1472	2318
	Passed	1505	1297	2086
	Failed	173	175	232
1967	Total*	1381	1016	2002
	Passed	1315	961	1838
	Failed	66	555	164
1968	Total*	4445	2396	3733
	Passed	4299	2286	3560
	Failed	146	110	171
1969*	Total*	1208	1336	2083
	Passed	1149	1232	1926
	Failed	46	103	149

* The slight difference in the total figure is due to tests which were void.

SOURCE: Annual Reports of the Board of Elections of The City of New York.

Exhibit "2"

BRANCH REGISTRATION

	N.Y.	BRONX	KINGS
1964	41,646	29,145	38,546
Registration was held in 88 Firehouses throughout entire city of N.Y.			
1965	5,014	3,672	2,589
Registration was conducted in 10 Mobile Units throughout entire city of N.Y.			
1966	5,773	2,324	3,092
Registration was conducted in 117 Branch officers throughout entire city of N.Y.			
1967	No branch registration.		
1968	4,091	3,865	7,447
Registration was conducted for 9 days in August at 19 branches in N.Y., 24 branches in the Bronx and 32 branches in Kings.			
1969	32,457	14,129	12,891
Registration was conducted for 17 days in August at 60 branches in N.Y., 52 branches in Bronx, and 61 branches in Queens.			

Answer**(Filed March 10, 1972)****Civil Action No. 2419-71****[Title Omitted]**

Comes now the defendant, United States of America, by and through its attorneys, and answers as follows:

1. The United States admits the allegations of paragraph 1 of the Amendment Complaint, hereinafter referred to as the Complaint.

2. The United States admits the allegations of paragraph 2 of the Complaint.

3. The United States admits the allegations of paragraph 3 of the Complaint.

4. The United States admits the allegation of the first sentence of paragraph 4 of the Complaint. With respect to the allegation in the second sentence of paragraph 4, the United States admits that English-Spanish affidavits were provided by the New York City Board of Elections but, on information and belief, avers that such affidavits were not so provided prior to 1967.

5. The United States admits the allegations of paragraph 5 of the Complaint insofar as the allegations refer to Article II, Section 1 of the Constitution of New York as opposed to the averment in paragraph 5 of the Complaint that said allegations refer to Article I, Section 1 of the Constitution of New York.

6. The United States admits the allegations of the first sentence of paragraph 6 of the Complaint. The United

Answer

States admits that portion of the second sentence of paragraph 6 which alleges that several different type tests were administered to determine literacy. The United States is without knowledge or information sufficient to form a belief as to the truth of the allegation that such tests were administered with "absolutely no intention or effect as a device or test to abridge or deny the right to vote on the basis of race or color."

7. The United States admits the allegations of paragraph 7 of the Complaint insofar as it alleges the legal effect of the Voting Rights Act Amendments of 1970 but avers, on information and belief, that the suspension of the literacy requirement was not uniformly implemented.

8. The United States admits the allegations of paragraph 8 of the Complaint.

9. The United States admits the allegations of paragraph 9 of the Complaint.

10. The United States admits the allegations of paragraph 10 of the Complaint.

11. The United States is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 11 of the Complaint. The United States admits the allegations of the second sentence of paragraph 11 of the Complaint.

12. The United States admits that the "Annual Reports of the Board of Elections of the City of New York" indicate that the literacy tests referred to in paragraph 12 of the Complaint were administered in New York, Bronx and

Answer

Kings Counties for the years 1961 to 1969, but that such figures are incomplete. Answering further the United States avers that the "Annual Reports of the Board of Elections of the City of New York" indicate that the total number of literacy tests administered in New York, Bronx and Kings Counties for the years 1961 to 1969 and the results thereof, including those indicated in paragraph 12 of the Complaint, are set forth in exhibit "1" attached.

13. The United States admits the allegations of paragraph 13 of the Complaint.

14. The United States admits the allegations of paragraph 14 of the Complaint.

15. The United States admits the allegations of paragraph 15 of the Complaint.

16. The United States is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the Complaint.

/s/ M. KARL SHURTLIFF

GERALD W. JONES

M. KARL SHURTLIFF

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 739-2167

Motion for Summary Judgment**(Filed March 17, 1972)**

Index No. 2419-71

[Title Omitted]

SIBS :

PLEASE TAKE NOTICE that upon the complaint and answer herein copies of which are annexed hereto, and upon the annexed affidavit of WINSOR A. LOTT, sworn to December 28, 1971 and the attached exhibits thereto, and upon the annexed affidavit of ALEXANDER BASSETT, sworn to March 16, 1972 and the exhibits attached thereto and upon the affidavit of DARBY M. GUADIA, sworn to March 16, 1972 and the affidavits of BEATRICE BERGER and GUS GALLI, sworn to March 17, 1972 and upon all other proceedings had heretofore, plaintiff will move this Court at a date to be determined by the Court, for an order pursuant to Federal Rules of Civil Procedure, Rule 56(b), granting summary judgment in favor of said plaintiff and for such further and other relief as to the Court seems just and proper.

Dated: New York, New York

March 17, 1972

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Plaintiff
By

/s/ JOHN G. PROUDFIT
JOHN G. PROUDFIT
Assistant Attorney General
80 Centre Street
New York, New York 10013

Affidavit of Alexander Bassett**(Filed March 17, 1972)****(Title Omitted)**

**STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:**

ALEXANDER BASSETT, being duly sworn, deposes and says:

I am the Administrator for the Board of Elections in the City of New York which includes the counties of New York, Bronx and Kings (as well as Queens and Richmond). I have been employed by the Board of Elections since 1939.

Section 150 and 168 of the Election Law of the State of New York required a "new voter" to present proof of literacy by obtaining and submitting to the Election Inspectors at the time of registration a certificate of literacy issued under the rules and regulations of the Board of Regents of the State of New York to the effect that the voter, to whom it is issued, is able to read and write English, or is able to read and write English save for physical disability only, and to the extent of such physical disability, which shall be stated in the certificate.

Prior to 1965 a "new voter" was allowed to present as evidence of literacy a certificate or diploma showing that he had completed the work of an approved eighth-grade elementary school or of a higher school in which English is the language of instruction or matriculation card issued by a college or a University to a student then at such institution or a certificate or letter signed by an official of the University or college certifying to such attendance. In 1965 Section 168 was amended so that a sixth-grade rather than an eighth-grade education was evidence of lit-

Affidavit of Alexander Bassett

eracy and such education could be in "a public school or a private school or a private school accredited by the Commonwealth of Puerto Rico in which school instruction is carried on predominantly in the English language".

Beginning in the latter part of 1966, to facilitate the provision of the "Voting Rights Act of 1965" that literacy might be in Spanish as well as in English, inspectors of the Board of Elections were instructed to accept affidavits of literacy which were not filled out in their presence. Thus, although the affidavits were in English, the Spanish speaking voters could seek assistance in completing such affidavits. To aid in implementing the provision of the Act which provided for literacy in Spanish, since 1967 the Board of Elections in the City of New York has provided that in lieu of a diploma or certificate as evidence of literacy, a person may execute an English-Spanish affidavit (a copy of the affidavit is annexed hereto as Exhibit 1) and registration is accomplished by the execution of English-Spanish forms.

In accordance with the literacy provisions of the Election Law, the Board of Education of the City of New York designated examiners for the purpose of examining applicants for literacy tests and issuing certificates to those qualified. The literacy tests were administered until 1970 when they were suspended pursuant to the "Voting Rights Act Amendments of 1970". Copies of the Reports of the literacy tests in the Annual Report of the Board of Elections in the City of New York for the years 1961 to 1969 are annexed hereto as Exhibit 2.

Subsequent to the enactment of the Voting Rights Act Amendments of 1970, employees of the Board of Elections were instructed that proof of literacy was no longer required. Any disregarding of this instruction with respect

Affidavit of Alexander Bassett

to the suspension of the literacy requirement, if such occurred would have been an isolated incident and was absolutely unauthorized and in error.

A new instruction in writing will be issued to all employees of the Board of Elections responsible for registration, renewing the direction previously given that absolutely no proof of literacy is necessary as an eligibility requirement for voter registration.

Voter registration is conducted centrally throughout the year in each of the counties comprising New York City at the office of the Central Board of Elections in each such county. During the beginning of October of each year there is local registration conducted, for 3 or 4 days, at the designated polling place for each of the election districts in every county in New York City. (Exhibit 3 annexed hereto indicates the number of voters registered during 1961 through 1971).

At the time the literacy tests were administered during local registration, they were given at schools throughout the city (where the polls were also located in many instances), and were conducted under the supervision of the Board of Education. During the remainder of the year the tests were given at the Board of Education, 110 Livingston Street in Brooklyn, however in 1964, employees of the Board of Elections were authorized to give the tests, so that thereafter they could be administered at the Central Boards, rather than requiring the applicant to go to Brooklyn.

Beginning in 1964 and every year since with the exception of 1967 there have been registration drives conducted in the summer. In 1964 registrations were conducted in firehouses and the following year in Mobil Units, subsequent registration have been conducted in branches

Affidavit of Alexander Bassett

throughout the city. Emphasis during the branch registration was given in particular to areas with highly density black population. Considerable money was expended in conduction of these vote registration drives and in encouraging people to register. (Exhibit 3 annexed hereto).

The Board of Elections has always sought to encourage registration of all qualified citizens in every area of the City. The literacy test has not been used with any purpose or intent to deny or abridge the right of any person to vote on account of race or color. The literacy test, in the absence of other acceptable evidence of literacy, has been utilized by the Board of Elections solely for the purpose of establishing literacy pursuant to the requirements of the New York Election Law.

The foregoing statements are true and correct to the best of my knowledge.

/s/ ALEXANDER BASSETT
ALEXANDER BASSETT

(Sworn to March 16, 1972.)

Affidavit of Winsor A. Lott**(Filed March 17, 1972)****(Title Omitted)**

**STATE OF NEW YORK,
COUNTY OF ALBANY, ss.:**

WINSOR A. LOTT, being duly sworn, deposes and says:

I am Chief of the Bureau of Elementary and Secondary Educational Testing of the New York State Education Department. I have been employed by the State Education Department since 1959 and have been involved in the testing field since 1957. I am fully familiar with the New York State Literacy test.

In 1921, New York State adopted a constitutional amendment requiring that all voters must be "able, except for physical disability, to read and write English". Since 1923, the Board of Regents literacy test has been the only authorized test pursuant to the legislative requirements implementing the literacy requirement.

The Regents literacy test is designed to minimize subjective judgment on the part of the examiners. The test consists of a paragraph of 100-150 words written in simple language, followed by eight completion type questions. The questions can be answered in one or two words and are based strictly on what is contained in the paragraph. While the questions are easy, the applicant must be able to understand what he reads in order to answer them correctly. It is not a test of memory, since the applicant can refer to the paragraph while answering the questions.

A number of tests are prepared each year by the Bureau of Elementary and Secondary Educational Testing of the State Education Department. These are administered to a sample of fifth-grade pupils in schools located through-

Affidavit of Winsor A. Lott

out the State to insure that the tests are at the proper level of difficulty and to discover any unforeseen problems. From this number, seven tests are selected for final printing and distribution. (Copies of all of the tests and answer keys administered during the years 1961 through 1969 are annexed hereto as Exhibit "1").

The vast majority of the literacy tests are administered to new voters by teachers under the direction of local superintendents of schools. The examiner is required to make few decisions, if any, as to the correctness of the answers given; each examiner is provided with an answer "key". The test is treated as confidential material, and each test and certificate, whether used or not, must be accounted for. (Instructions for administering the test are annexed hereto as Exhibit "2").

The late Frank P. Graves, Commissioner of Education from 1921 to 1940, stated that the literacy tests have been an important incentive for the foreign-born to attend evening classes and "a powerful instrument in the solution of the problem of illiteracy" in New York State. Until the tests were suspended in 1970, more than three million tests had been administered. In recent years, only five percent of the applicants failed their literacy tests.


The test was not intended and has never been constructed so as to discriminate in any way on the basis of race or color. The test is constructed solely to test the literacy of the person being examined.

I have read the above statements which to the best of my knowledge are true and correct.

/s/ WINSOR A. LOTT
WINSOR A. LOTT

(Sworn to December 28, 1971.)

Exhibit Annexed to Foregoing Affidavit

(See Opposite) 

Affidavit of Darby M. Gaudia**(Filed March 17, 1972)****71-2419****(Title Omitted)**

**STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:**

DARBY M. GAUDIA, being duly sworn, deposes and says:

I am the Chief Clerk of the New York Borough Office of the Board of Elections of New York City. I have held this position since April 1967 and I have been employed by the Board of Elections since April 1967. I have examined the affidavit of Alexander Bassett, Administrator of the Board of Elections, submitted in this action, and I can verify from my personal experience that the statements made by Mr. Bassett about voting procedures in New York City are true.

In New York County, prior to 1965, a new voter was allowed to present as evidence of literacy a certificate or diploma showing that he had completed the work of an approved eighth-grade elementary school or of a higher school in which English is the language of instruction, or a matriculation card issued by a college or university to a student who was then at such institution, or a certificate or letter signed by an official of a college or university certifying to such attendance.

In accordance with the provisions of the Voting Rights Act of 1965, employees of the Board of Elections were subsequently advised that proof of literacy was no longer restricted to the English language, and that proof of literacy in Spanish was acceptable. To aid in this change, since 1967 the Board of Elections in New York County has provided that in lieu of a diploma or certificate as evidence

Affidavit of Darby M. Gaudin

of literacy, a person may execute an English-Spanish affidavit, and registration is accomplished by the execution of English-Spanish forms. The copy of the English-Spanish affidavit that is annexed to Mr. Bassett's affidavit, is the form that was used in New York County.

In addition to central registration at the Board of Elections which occurs continuously throughout the year, there is also local registration at designated polling places in every election district of the County, at the beginning of October of each year. Local registration is always accompanied by publicity in the news media and its manifest purpose is to encourage more citizens in the County to register to vote.

Beginning in 1964 and in every subsequent year except 1967, registration drives have also been held during the summers. In 1964 the registrations were accepted in firehouses, and in 1965 in mobile units. Other registrations have been accepted in branch offices through the County.

In New York County the literacy tests have never been used with a purpose of intent to deny any person the right to vote because of race or color. Indeed, until 1964, the literacy tests were administered to new voters by personnel of the New York City Board of Education, and not by personnel of the Board of Elections. Furthermore, the literacy tests were at all times formulated by the Board of Regents of the New York State Department of Education, and the test questions and answers were standardized so that there was no possibility of the examiners administering the tests in an unfair manner.

Subsequent to the enactment of the Voting Rights Act Amendments of 1970, employees of the Board of Elections were instructed that proof of literacy was no longer required. Any disregarding of the instructions with respect

Affidavit of Darby M. Gaudia

to the suspension of the literacy requirement, if such occurred, would have been an isolated incident and was absolutely unauthorized and in error.

It has always been the policy of the Borough Office of New York County to encourage all persons to exercise their right to vote. No discrimination on account of race or color has been practiced by the Board of Elections against the citizens of this County.

The foregoing statements are true and correct to the best of my knowledge.

/s/ DARBY M. GAUDIA
DARBY M. GAUDIA
Chief Clerk

(Sworn to March 16, 1972.)

Affidavit of Beatrice Berger**(Filed March 17, 1972)****71-2419****(Title Omitted)**

**STATE OF NEW YORK,
COUNTY OF BRONX, ss.:**

BEATRICE BERGER, being duly sworn, deposes and says:

I am the Chief Clerk of the Bronx Borough Office of the Board of Elections of New York City. I have held this position since 1970 and I have been employed by the Board of Elections since 1959. I have examined the affidavit of Alexander Bassett, Administrator of the Board of Elections, submitted in this action, and I can verify from my personal experience that the statements made by Mr. Bassett about voting procedures in New York City are true.

In Bronx County, prior to 1965, a new voter was allowed to present as evidence of literacy a certificate or diploma showing that he had completed the work of an approved eighth-grade elementary school or of a higher school in which English is the language of instruction, or a matriculation card issued by a college or university to a student who was then at such institution, or a certificate or letter signed by an official of a college or university certifying to such attendance.

In accordance with the provisions of the Voting Rights Act of 1965, employees of the Board of Elections were subsequently advised that proof of literacy was no longer restricted to the English language, and that proof of literacy in Spanish was acceptable. To aid in this change, since 1967 the Board of Elections in Bronx County has

Affidavit of Beatrice Berger

provided that in lieu of a diploma or certificate as evidence of literacy, a person may execute an English-Spanish affidavit, and registration is accomplished by the execution of English-Spanish forms. The copy of the English-Spanish affidavit that is annexed to Mr. Bassett's affidavit, is the form that was used in Bronx County.

In addition to central registration at the Board of Elections which occurs continuously throughout the year, there is also local registration at designated polling places in every election district of the County, at the beginning of October of each year. Local registration is always accompanied by publicity in the news media and its manifest purpose is to encourage more citizens in the County to register to vote.

Beginning in 1964 and in every subsequent year except 1967, registration drives have also been held during the summers. In 1964 the registrations were accepted in firehouses, and in 1965 in mobile units. Other registrations have been accepted in branch offices through the County.

In Bronx County the literacy tests have never been used with a purpose of intent to deny any person the right to vote because of race or color. Indeed, until 1964, the literacy tests were administered to new voters by personnel of the New York City Board of Education, and not by personnel of the Board of Elections. Furthermore, the literacy tests were at all times formulated by the Board of Regents of the New York State Department of Education, and the test questions and answers were standardized so that there was no possibility of the examiners administering the tests in an unfair manner.

Subsequent to the enactment of the Voting Rights Act Amendments of 1970, employees of the Board of Elections were instructed that proof of literacy was no longer re-

Affidavit of Beatrice Berger

quired. Any disregarding of the instructions with respect to the suspension of the literacy requirement, if such occurred, would have been an isolated incident and was absolutely unauthorized and in error.

It has always been the policy of the Borough Office of Bronx County to encourage all persons to exercise their right to vote. No discrimination on account of race or color has been practiced by the Board of Elections against the citizens of this County.

The foregoing statements are true and correct to the best of my knowledge.

/s/ BEATRICE BERGER
BEATRICE BERGER
Chief Clerk

(Sworn to March 17, 1972)

Affidavit of Gus Galli
(Filed March 17, 1972)

71-2419

[Title Omitted]

STATE OF NEW YORK,
COUNTY OF KINGS, ss.:

GUS GALLI, being duly sworn, deposes and says:

I am the Chief Clerk of the Brooklyn Borough Office of the Board of Elections of New York City. I have held this position since 1966 and I have been employed by the Board of Elections since 1940. I have examined the affidavit of Alexander Bassett, Administrator of the Board of Elections, submitted in this action, and I can verify from my personal experience that the statements made by Mr. Bassett about voting procedures in New York City are true.

In Kings County, prior to 1965, a new voter was allowed to present as evidence of literacy a certificate or diploma showing that he had completed the work of an approved eighth-grade elementary school or of a higher school in which English is the language of instruction, or a matriculation card issued by a college or university to a student who was then at such institution, or a certificate or letter signed by an official of a college or university certifying to such attendance.

In accordance with the provisions of the Voting Rights Act of 1965, employees of the Board of Elections were subsequently advised that proof of literacy was no longer restricted to the English language, and that proof of literacy in Spanish was acceptable. To aid in this change,

Affidavit of Gus Galli

since 1967 the Board of Elections in Kings County has provided that in lieu of a diploma or certificate as evidence of literacy, a person may execute an English-Spanish affidavit, and registration is accomplished by the execution of English-Spanish forms. The copy of the English-Spanish affidavit that is annexed to Mr. Bassett's affidavit, is the form that was used in Kings County.

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Beginning in 1964 and in every subsequent year except 1967, registration drives have also been held during the summers. In 1964 the registrations were accepted in firehouses, and in 1965 in mobile units. Other registrations have been accepted in branch offices through the County.

In Kings County the literacy tests have never been used with a purpose of intent to deny any person the right to vote because of race or color. Indeed, until 1964, the literacy tests were administered to new voters by personnel of the New York City Board of Education, and not by personnel of the Board of Elections. Furthermore, the literacy tests were at all times formulated by the Board of Regents of the New York State Department of Education, and the test questions and answers were standardized so that there was no possibility of the examiners administering the tests in an unfair manner.

Subsequent to the enactment of the Voting Rights Act Amendments of 1970, employees of the Board of Elections

Affidavit of Gus Galli

were instructed that proof of literacy was no longer required. Any disregarding of the instructions with respect to the suspension of the literacy requirement, if such occurred, would have been an isolated incident and was absolutely unauthorized and in error.

It has always been the policy of the Borough Office of Kings County to encourage all persons to exercise their right to vote. No discrimination on account of race or color has been practiced by the Board of Elections against the citizens of this County.

The foregoing statements are true and correct to the best of my knowledge.

/s/ GUS GALLI
GUS GALLI
Chief Clerk

(Sworn to March 17, 1972)

Affidavit of Alexander Bassett
(Filed March 31, 1972)

Index No. 2419-71

[Title Omitted]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

ALEXANDER BASSETT, being duly sworn, deposes and says:

I make this affidavit as a supplement to my previous affidavit dated March 16, 1972.

Annexed hereto as Exhibit "1" is a copy of a letter and instructions relating to the suspension of the literacy test, which was received by the Board of Elections from the Secretary of State of the State of New York. Sometime around the beginning of September of 1970, approximately 25,000 copies of the instructions relating to the literacy requirement (annexed hereto as Exhibit "2") were made up and put into the supply boxes that went out to the Election Inspectors in the five counties comprising New York City. In addition, all of those Inspectors who attended instruction classes at the Board of Elections prior to registration in October 1970 were orally instructed that proof of literacy was no longer required. Any Inspector who thereafter required proof of literacy would have been doing so contrary to official policy and instructions.

As stated in my previous affidavit although affidavits printed in Spanish were not available in the Fall of 1966, in order to assist Spanish speaking persons to present proof of literacy, Inspectors were instructed to permit the affidavits concerning proof of literacy which were printed in English, to be filled out outside their presence so that the individual could seek assistance in translation and completion of such affidavit.

/s/ ALEXANDER BASSETT

(Sworn to March 30, 1972)

Exhibits Annexed to Foregoing Affidavit**(Letter dated August 7, 1970)**

State of New York
DEPARTMENT OF STATE
162 Washington Avenue
Albany, New York 12225

August 7, 1970

IMPORTANT NOTICE**TO ALL BOARDS OF ELECTIONS**

In accordance with the direction of Governor Nelson A. Rockefeller that the 1970 Amendments to the Voting Rights Act be implemented by each Board of Elections throughout New York State, you are hereby instructed accordingly.

In order to maintain the integrity and efficiency of the elective process and to protect fully the franchise of all voters and would-be voters of our state, the following procedures should be put into effect immediately by all election officials charged with the administration of the registration process:

1. On and after August 7, 1970, an applicant for registration, otherwise qualified to vote, must be registered and *no proof nor test of literacy shall be required*. Election personnel conducting central registration and inspectors of election at local registration must register such applicants.

2. After the applicant has been registered and *so advised*, information regarding proof of literacy should be elicited from the applicant, so that whatever the

Exhibits Annexed to Foregoing Affidavit

ultimate decision of the court may be, the registration would continue to be valid.

3. If the applicant for registration fails or refuses to supply proof of literacy, his registration shall nevertheless continue in full force and effect as long as the Voting Rights Act Amendments remain applicable.

4. With respect to new voters who do not establish proof of literacy at the time of registration, a list of the names of such person should be maintained, so that in the event the provision in the Act relating to literacy is declared invalid, they may be afforded an opportunity to meet the literacy requirements of state law.

Beginning the first day of central registration in 1971 (January 4, 1971) and thereafter, all persons, 18 years of age or older, who are otherwise qualified to vote, shall be eligible to register and vote at all primary, special and general elections held on or after January 4, 1971. This includes the right of special enrollment for the 1971 primaries for such new voters pursuant to sections 187 and 188 of the Election Law.

Each Board of Election shall instruct all inspectors of election and other election personnel charged with the responsibility of the registration process, regarding these new provisions of law and to do whatever may be necessary to insure their effective application.

As you may know, court actions have been instituted to test the constitutional validity of the principal provisions of the 1970 Voting Rights Act Amendment. In the event that one or more of the provisions are ultimately held to be invalid, the New York State Constitution and statutes

Exhibits Annexed to Foregoing Affidavit

would govern. However unless this occurs, full effect and compliance must be given to the new provisions of law.

In the near future we will send you additional instructional material to assist new voters and also to serve as a guide to election officials. You may rest assured that you will be advised promptly should anything occur which affects the procedure outlines above.

Any questions regarding the foregoing should be directed to Thomas Wallace, Director of the Election and Law Bureau.

Each election commissioner should acknowledge receipt of this notice by signing and returning to Mr. Wallace the enclosed receipt form.

Sincerely,

/s/ JOHN P. LOMENZO
Secretary of State

Commissioner James M. Power

Exhibits Annexed to Foregoing Affidavit

(Letter dated August 7, 1970)

BOARD OF ELECTIONS
IN
THE CITY OF NEW YORK

August 7, 1970

IMPORTANT NOTICE

TO ALL BOARDS OF ELECTIONS

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2. After the applicant has been registered and *so advised*, information regarding proof of literacy should be elicited from the applicant, so that whatever the ultimate decision of the court may be, the registration would continue to be valid.

Exhibits Annexed to Foregoing Affidavit

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Each Board of Election shall instruct all inspectors of election and other election personnel charged with the responsibility of the registration process, regarding these new provisions of law and to do whatever may be necessary to insure their effective application.

COMMISSIONERS OF ELECTIONS

MAURICE J. O'ROURKE, President	JAMES M. POWER
THOMAS MALLEE, Secretary	J.J. DUBERSTEIN

Memorandum of the United States**IN THE UNITED STATES DISTRICT COURT****FOR THE DISTRICT OF COLUMBIA****CIVIL ACTION No. 2419-71**

NEW YORK STATE on behalf of **NEW YORK, BRONX and
KINGS COUNTIES**, political subdivisions of said State,

*Plaintiff,***v.**

UNITED STATES OF AMERICA,

Defendant.

**DEFENDANT'S MEMORANDUM AND AFFIDAVIT IN RESPONSE TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Based on the facts set forth in the affidavits attached to plaintiff's Motion for Summary Judgment and the reasons set forth in the attached affidavit of David L. Norman, Assistant Attorney General, the United States hereby consents to the entry of a declaratory judgment under Section 4(a) of the Voting Rights Act of 1965 (42 U.S.C. 1973 b(a)).

DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

Affidavit of the Assistant Attorney General
(Filed April 3, 1972)

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON,

DAVID L. NORMAN, having been duly sworn, states as follows:

My name is David L. Norman. I am Assistant Attorney General, Civil Rights Division, Department of Justice. I make this affidavit in response to the plaintiff's Motion for Summary Judgment in the case of *New York State v. United States of America*, Civil Action No. 2419-71, United States District Court for the District of Columbia. I am familiar with the Complaint filed by the plaintiff and with the Answer filed by the United States herein.

Following the filing of the Complaint, the United States, pursuant to the requirements of Section 4(a) of the Voting Rights Act of 1965, as amended (42 U.S.C. 1973b(a)), undertook to determine if the Attorney General could conclude that he has no reason to believe that the New York State literacy test has been used in the counties of New York, Bronx and Kings during the preceding 10 years for the purpose or with the effect of denying or abridging the right to vote on account of race or color, and thereby consent to the judgment prayed for. At my direction, attorneys from the Department of Justice conducted an investigation which consisted of examination of registration records in selected precincts in each covered county, interviews of certain election and registration officials and interviews of persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties.

Affidavit of the Assistant Attorney General

I have reviewed and evaluated the data obtained through this investigation in light of the statutory guidelines set forth in Section 4(a) and (d) of the Voting Rights Act of 1964 (42 U.S.C. 1973b (a) and (d)). In my judgment the following facts are relevant to the issue of whether the New York literacy test "has been used during the ten years preceding the filing of [this] action for the purpose or with the effect of denying or abridging the right to vote on account of race or color" and to the question of whether the Attorney General should determine "that he has no reason to believe" that the New York literacy test has been used with the proscribed purpose or effect:

1. New York presently has suspended all requirements of literacy as a condition of registration and voting as required by the 1970 Amendments to the Voting Rights Act. Our investigation revealed no allegation by black citizens that the previously enforced literacy test was used to deny or abridge their right to register and vote by reason of race or color.

2. Section 4(e) of the Voting Rights Act of 1965 modified the New York English language literacy requirements by providing that the literacy requirement could be satisfied by proof of attendance through the sixth grade at any American-flag school, including those in Puerto Rico. This Act was passed on August 6, 1965 and was finally upheld by the United States Supreme Court (*Katzenbach v. Morgan*, 384 U.S. 641) on June 16, 1966. Our investigation indicated that the implementation of this provision through the use of Spanish language affidavits was not completed until the fall of 1967.

Affidavit of the Assistant Attorney General

The supplemental affidavit of Alexander Bassett dated March 30, 1972, indicates that New York authorities took significant interim steps to minimize any adverse impact resulting from the delay in making available Spanish language affidavits. Our investigation did not reveal any individual citizens whose inability to register is attributable to the absence of Spanish language affidavits.

3. The 1970 Amendments to the Voting Rights Act suspended in all jurisdictions any use of literacy tests or devices. These Amendments were effective on June 22, 1970, and were upheld by the United States Supreme Court (*Oregon v. Mitchell*, 400 U.S. 112), in December 1970. Our investigation included a sampling of registration records in 21 election districts in the three covered counties. While there is no evidence that the state continued to require a formal literacy test after the Act (except in isolated cases), in each election district examined, a significant percentage of those registration applications examined after June 1970 bear a notation that some proof of literacy was recorded.

The supplemental affidavit of Alexander Bassett indicates that New York authorities took reasonable steps to notify all registration workers of the suspension of all literacy requirements and that notations of proof of literacy resulted from either (a) obtaining such proof contingently in the event the courts ruled in New York's favor in the challenge of the literacy suspension or (b) isolated instances where individual registration officials continued to obtain literacy contrary to official instructions.

Based on the above findings I conclude, on behalf of the Acting Attorney General that there is no reason to believe

Affidavit of the Assistant Attorney General

that a literacy test has been used in the past 10 years in the counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, except for isolated instances which have been substantially corrected and which, under present practice cannot reoccur.

.....
DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

Sworn to and subscribed
before me this 3rd day
of April 1972

.....
Notary Public
My commission expires

Motion to Intervene as Defendants**(Filed April 7, 1972)****Civil Action No. Civ. 2419-71****(Title omitted)**

The N.A.A.C.P., New York City Region of New York State Conference of Branches, Simon Levine, Antonia Vega, Samuel Wright, Waldaba Stewart and Thomas R. Fortune, on behalf of themselves and all others similarly situated, move for leave to intervene as defendants in order to assert the defenses set forth in their proposed answer, a copy of which is attached hereto, on the following grounds:

1. This is an action brought by the State of New York to exempt from coverage by sections 4 and 5 of the Voting Rights Act of 1965, as amended, the counties of Bronx, Kings and New York in the state of New York. Petitioner N.A.A.C.P., New York City Region of New York State Conference of Branches, is an organization formed to protect the legal, social, economic and political rights and interests of black Americans, and it petitions to intervene on behalf of itself, its constituent branches, and all of its members and other black residents of New York, Bronx and Kings counties. Petitioners Simon Levine, Samuel Wright, Waldaba Stewart and Thomas Fortune are duly qualified black voters in Kings County, New York. Petitioners Wright and Stewart are members of the New York State Assembly and petitioner Fortune is a member of the New York State Senate. Petitioner Antonia Vega is a duly qualified Puerto Rican voter in Kings County, New York.

2. If the plaintiff in the instant action is successful, petitioners and the people whom they represent will be

Motion to Intervene as Defendants

deprived of all of the protections provided by sections 4 and 5 of the Voting Rights Act as amended, 42 U.S.C. §§1973b, 1973c. The State of New York will be able to immediately implement and enforce against petitioners and other minority voters changes in voting qualifications and prerequisites to voting and voting standards, practices and procedures, without first establishing that such changes do not have the purpose and will not have the effect of abridging or denying the right to vote on account of race or color, as is now required by section 5. Subsequent to August 6, 1975, New York will be able to deny petitioners and other minority group voters the right to vote for failure (a) to demonstrate the ability to read, write, understand or interpret any matter, (b) to demonstrate educational achievement or knowledge of any particular subject, (c) to possess good moral character, or (d) to prove their qualifications by the voucher of registered voters or of any other class. Compare 42 U.S.C. §1973b with 42 U.S.C. § 1973aa.

3. Petitioners have commenced an action in the United States District Court for the Southern District of New York to enforce section 5 of the Voting Rights Act, pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983, alleging that plaintiff has gerrymandered Assembly, Senatorial and Congressional districts in Kings, Bronx and New York counties so that, on purpose and in effect, the right to vote will be denied on account of race or color. *N.A.A.C.P. v. New York City Board of Elections*. If plaintiff were to succeed in the instant action petitioners would be legally bound by that decision in their action in the Southern District of New York and the New York action, resting as it does on the applicability of sections 4 and 5 of the Voting Rights Act to the three counties involved, would necessarily fail.

Motion to Intervene as Defendants

4. Petitioners thus have an interest in the subject of this action and are so situated that the disposition of this action will necessarily control their ability to protect their interests under sections 4 and 5 of the Voting Rights Act, including those asserted in *N.A.A.C.P. v. New York City Board of Elections*, and may impair or impede their ability to protect their interests in registering to vote, voting, and seeking public office free from laws or practices discriminatory in purpose or effect or otherwise invalid or unconstitutional.

5. On three occasions during the past three weeks, the last of them on Monday, April 3, 1972, attorneys in the Department of Justice represented to counsel for petitioners that the United States would oppose New York's motion for summary judgment in the instant action. These attorneys were advised by counsel for petitioners that petitioners were about to file *N.A.A.C.P. v. New York City Board of Elections*, that petitioners would oppose Justice Department approval of New York's changes in the Assembly, Senatorial and Congressional districts in New York, Kings and Bronx counties when those changes were submitted to the Department for approval, and that the United States Civil Rights Commission plans to hold hearings in New York City on April 19, 1972, to collect information as to whether it should also oppose those changes when they are submitted to Justice. At no time did any of the three Justice Department attorneys who assured counsel for petitioners that the United States would oppose the motion for summary judgment in the instant case inquire of counsel for petitioners whether he or any of the petitioners had information or evidence which would support the government's alleged position that sections 4 and 5 of the Voting Rights Act should continue to be applied to Kings, Bronx and New York counties. On Monday,

Motion to Intervene as Defendants

April 3, 1972, the United States filed a memorandum and affidavit consenting to New York's motion for summary judgment. Counsel for petitioners were first informed of this action on the afternoon of Wednesday, April 5. At that time counsel for petitioners advised the Department of Justice that petitioners might wish to take some action in the instant case, possibly including seeking to intervene. Counsel for petitioners are advised that the United States has requested that a decree exempting New York from coverage by sections 4 and 5 of the Act be entered as soon as possible. The United States is of course aware that the entry of such a decree will defeat petitioners pending action in *N.A.A.C.P. v. New York City Board of Elections*, render useless any submission by petitioners to the Attorney General opposing approval of the changes in New York's districting, make pointless the planned Civil Rights Commission hearings, and increase the legal obstacles to intervention. Under these circumstances it is painfully clear that the United States is not adequately representing the interests of petitioners.

6. Because counsel for petitioners was only informed within the last 48 hours that the United States would not adequately represent the interests of petitioners, and because substantial litigation of the issues herein has not yet occurred, the instant application to intervene is timely.

/s/ JEFFRY A. MINTZ

JACK GREENBERG

JEFFRY MINTZ

ERIC SCHNAPPER

Suite 2030

10 Columbus Circle

New York, N.Y. 10019

Telephone: 212-586-839

Counsel for Petitioners

Affidavit of Eric Schnapper**(Filed April 17, 1972)****Civil Action No. Civ. 2419-71****(Title omitted)**

**COUNTY OF NEW YORK,
STATE OF NEW YORK, ss.:**

ERIC SCHNAPPER, being duly sworn, deposes and says:

1. I am a member of the bar of the Supreme Court of California and a staff attorney at the N.A.A.C.P. Legal Defense and Educational Fund in New York City.
2. On March 10, 1972, I was first contacted by petitioner Samuel Wright with regard to the reapportionment of the Senatorial and Assembly districts and the pending reapportionment of the Congressional districts in Bronx, Kings and New York Counties. Mr. Wright requested that the N.A.A.C.P. Legal Defense and Education Fund provide legal assistance to prevent implementation of what he believed were racially gerrymandered districts in those three counties.
3. On March 21, 1972, I telephoned the Department of Justice in an attempt to contact Mr. Jerry Kieth, Esq., whom I was advised was responsible for reviewing New York's submissions of its reapportionment laws pursuant to section 5 of the Voting Rights Act. In Mr. Kieth's absence I spoke with Attorney Fred Gray of the Department. I advised Mr. Gray that when the redistricting laws were submitted to the Department of Justice I would want to submit material and arguments in opposition to their approval. Mr. Gray advised me that I should speak with

Affidavit of Eric Schnapper

Mr. Kieth concerning this section 5 submission since Mr. Kieth was responsible for preparing recommendations for Department action on those laws. Mr. Gray informed me as well that the State of New York had instituted the instant action and had moved for summary judgment, that the case was being handled by Attorney Carl Shurtleff for the United States, and that Mr. Shurtleff was preparing papers in opposition to that motion.

4. On March 23 I spoke by telephone with Mr. Shurtleff. Mr. Shurtleff confirmed that he was handling *New York v. United States* for the government, and that he was preparing to submit papers in opposition to New York's motion for summary judgment. Mr. Shurtleff also confirmed that Mr. Kieth would be handling the state's section 5 submission. I informed Mr. Shurtleff that we would want to present material concerning that submission and were considering instituting an action in the United States District Court for the Southern District of New York to enjoin New York from enforcing its redistricting legislation until the procedures of section 5 of the Voting Rights Act had been complied with.

5. On March 29, 1972, I spoke with Mr. Kieth by telephone. He confirmed that he was responsible for handling New York's section 5 submission, that Mr. Shurtleff was responsible for handling *New York v. United States*, and that Mr. Shurtleff was preparing papers for the United States opposing New York's motion for summary judgment. I advised Mr. Kieth that I would want to present material to the Department of Justice at the appropriate time concerning New York's section 5 submission, that I intended to bring on behalf of certain clients an action in the Southern District of New York to enjoin enforcement

Affidavit of Eric Schnapper

of New York's redistricting laws until they had been approved by the Department, and that the United States Civil Rights Commission intended to hold hearings in New York City on April 19, 1972, to collect information regarding the redistricting in the three counties covered by the Voting Rights Act to consider whether to ask the Attorney General to disapprove of the new district lines.

6. On March 28, 1972, Governor Rockefeller signed into law Chapters 76, 77 and 78 of the New York Laws of 1972 fixing the new Congressional district lines in New York, Bronx and Kings counties.

7. On April 3, 1972, I spoke with Mr. Kieth by telephone for the second time. He informed me that the Department of Justice would have no objection to the institution of *N.A.A.C.P. v. New York City Board of Elections*. I specifically inquired as to whether any developments had taken place in *New York v. United States*, and Mr. Kieth told me that as far as he knew Mr. Shurtleff was still preparing the government's papers in opposition to the motion for summary judgment.

8. At approximately 3:00 p.m. on April 5 I spoke with Mr. Kieth by telephone and was informed for the first time that two days earlier the United States had consented to the motion for summary judgment filed by the State of New York.

9. Messrs. Gray, Shurtleff and Kieth all indicated that they were aware that if New York prevailed in *New York v. United States* any attempt to enforce section 5 against the state, either in a private action or through the presentation of material to the Department of Justice, would be

Affidavit of Eric Schnapper

futile. At no time prior to the afternoon of April 5 did any of these attorneys intimate in any way that the United States was considering whether or not to consent to the motion for summary judgment. At no time did any of these three attorneys inquire whether I or petitioners had any evidence as to whether New York or officials in Kings, Bronx or New York counties had ever used a test or device, as defined in 42 U.S.C. § 1973b, with the purpose of the effect of denying or abridging the right to vote on account of race or color.

/s/ ERIC SCHNAPPER
Eric Schnapper

(Sworn to April 7, 1972.)

Complaint

(Filed April 7, 1972)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 72 Civ. 1460

Class Action

N.A.A.C.P., etc., et al.,

Plaintiffs,

—against—

NEW YORK CITY BOARD OF ELECTIONS, et al.,

Defendants.

JURISDICTION

1. This action arises under sections 5 and 12 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§1973c and 1973j. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

CLASS ACTION ALLEGATIONS

2. Plaintiffs sue on behalf of themselves and all others similarly situated. The class consists of all black, Puerto Rican, and other non-white residents of Kings, Bronx and New York Counties. The class has approximately 2 million members, and is clearly so numerous as to make joinder of all members impracticable. The representative parties are represented by competent counsel experienced in litigation under the Voting Rights Act, petitioner NAACP

Complaint

has a long history of protecting the interests of black residents of New York City, the representative parties have no interests antagonistic to those of the class, and the representative parties will thus fairly and adequately protect the interests of the class. There are questions of law and fact common to the class, including but not limited to whether the Counties of the Bronx, Kings and New York are covered by section 5 of the Voting Rights Act, 42 U.S.C. § 1973c and whether the state of New York complied with section 5 after it altered its Assembly, Senatorial and Congressional districts. The claims and defenses of the representative parties are typical of the claims and defenses of the class. The representative parties seek to bring this action under subdivision (2) of Rule 23(b), Federal Rules of Civil Procedure, because the defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

PARTIES

3. The N.A.A.C.P., New York City Region of the New York State Conference of Branches (hereinafter "NAACP") is an organization of 18 New York City branches of the National Association for the Advancement of Colored People. The NAACP and its constituent branches were formed to protect the legal, social, economic and political rights and interests of black Americans. The NAACP sues on behalf of itself, its constituent branches, all of its members, and all other black residents of the counties of New York, Bronx, and Kings, State of New York.

Complaint

4. Simon Levine is a qualified elector of Kings County, State of New York, and a black man. Although there are more than 1.5 million black residents in large communities in the Bronx, Kings and New York Counties, these areas have been gerrymandered under Chapters 11, 76, 77 and 78, Laws of New York of 1972 in such a manner that the vast majority of these black residents, plaintiff Levine among them, are in Congressional, Assembly and/or Senatorial districts with a majority of white voters. Plaintiff Levine's right to vote is thus abridged or denied, on purpose or in effect, on account of his race or color, by means of gerrymandering which keeps in a minority black voters or black voters in combination with sympathetic non-black voters.

5. Antonia Vega is a qualified elector of Kings County, State of New York, and a Puerto Rican. Although there are almost a million Puerto Rican residents in large communities in the Bronx, Kings and New York counties, those areas have been gerrymandered in such a way under Chapters 11, 76, 77 and 78, New York Laws of 1972, that the vast majority of Puerto Ricans, plaintiff Vega among them, are in Congressional, Assembly or Senatorial districts with a majority of non-Puerto Rican voters. Plaintiff Vega's right to vote is thus abridged or denied, on purpose or in effect, on account of her race or color, by means of gerrymandering which keeps in a minority Puerto Rican voters or Puerto Rican voters in combination with sympathetic non-Puerto Rican voters.

6. Assemblymen Samuel Wright (54th Assembly District) and Thomas Fortune (55th Assembly District) and Senator Waldaba Stewart (18th Senatorial District) are

Complaint

elected public officials and qualified electors residing in and representing parts of Kings County and seeking re-election to their respective offices. In order to have their names placed on the ballot in the forthcoming primary election, these plaintiffs are required to collect 50, 500 and 1,000 signatures respectively on nominating petitions from registered voters in their respective districts on or before May 2, 1972. The districts from which they are required to obtain these signatures were gerrymandered by Chapter 11, New York Laws of 1972, so as to make it more difficult for black candidates, or black candidates who vigorously advocated the interests of the black community, to obtain the needed signatures or to be elected. If these plaintiffs succeed in having their name placed on the ballot, they must then conduct extensive political campaigns for the nomination for and election to their respective political offices, including the raising and expenditure of funds, the recruitment and organization of volunteer supporters, and extensive personal campaigning. Their rights to vote as residents of their respective districts are denied or abridged, on purpose or in effect, on account of race or color because of this gerrymandering. If the new lines of the districts in which defendants are currently requiring that the elections be held are ultimately invalidated or altered because of the Voting Rights Act, virtually all of this petitioning and campaigning will be utterly wasted, inflicting upon plaintiffs an irreparable injury for which there is no possible remedy at law.

7. Defendant New York City Board of Elections is an agency of the City and State of New York established by law and responsible for the enforcement and administration of the Election Law in the City of New York, including the counties of Bronx, Kings and New York.

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8. Defendants William Larkin, President, Gumbersindo Martinez, Secretary, and J.J. Duberstein are the Commissioners of the New York City Board of Elections and are the officials responsible for enforcing and administering, in the name and on behalf of the New York City Board of Elections, the Election Law in the City of New York, including the counties of Bronx, Kings and New York.

9. Defendant Louis J. Lefkowitz is the Attorney General of the State of New York and the chief legal officer thereof.

10. Defendant John P. Lomenzo is the Secretary of State of the State of New York and is designated to supervise the Board of Elections of the City of New York and is responsible for the enforcement and administration of the Election Law in the State of New York.

THREE JUDGE COURT

11. Plaintiffs ask that this Court convene a three judge federal court to consider the instant action, as required by 42 U.S.C. § 1973c.

CAUSE OF ACTION

12. On March 27, 1971, there was published in the Federal Register, 36 Fed. Reg. 5809, (i) a determination by the Director of the Bureau of the Census that in each of the counties of Bronx, Kings and New York in the State of New York, considered as separate units, less than 50 percentum of the persons of voting age residing therein voted in the presidential election of November, 1968, said determination being made pursuant to section 4(b) of the Voting Rights Act of 1965, as amended, and (ii) a deter-

Complaint

mination by the Attorney General of the United States that New York State has a literacy test for prospective voters.

13. Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c, requires that any qualification, prerequisite, standard, practice or procedure, such as Senatorial, Assembly or Congressional district lines, may not be altered in any state or subdivision thereof as to which the determinations described in paragraph 12 have been made unless either (a) that alteration has been submitted by the chief legal officer of the jurisdiction enacting them to the Attorney General of the United States and the latter has not interposed an objection thereto within sixty days after such submission, or (b) a declaratory judgment has been obtained from the United States District Court for the District of Columbia that the alteration in said qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

14. By reason of the foregoing facts, said section 5 of the Voting Rights Act, as amended, applies to Bronx, Kings and New York Counties in the State of New York.

15. On January 14, 1971, there was signed into law by the Governor of the State of New York Chapter 11, New York Laws of 1972, which law became effective immediately. This law altered the lines of the districts in which members of the New York State Assembly and Senate are elected, establishing lines and districts different from those which existed on November 1, 1968.

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16. On March 28, 1972, there was signed into law by the Governor of the State of New York Chapters 76, 77 and 78, New York Laws of 1972, which law became effective immediately. This law altered the lines of the districts in which members of Congress are elected, establishing lines and districts different from those which existed on November 1, 1968.
17. Chapters 11, 76, 77 and 78, New York Laws of 1972, seek to establish qualifications or prerequisites to voting, or standards, practices, or procedures with respect to voting different from those in force or in effect on November 1, 1968.
18. The district lines set out in Chapters 11, 76, 77 and 78 are drawn with the purpose of abridging or denying, and do in effect abridge and deny, the rights of blacks, Puerto Ricans, and others, to vote on account of race or color, inter alia (a) by dividing substantial communities of minority groups among several districts so that such minority group will not constitute a majority of any one district, and (b) where minority group voters might be able to have an influence over elections in alliance with white voters sympathetic to the interests of the minority concerned, by placing those minority voters instead in districts in which the overwhelming majority of the voters are white voters unsympathetic or hostile to the interests of said minority groups.
19. The State of New York has neither sought nor obtained a declaratory judgment that the aforesaid changes in state law do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

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20. On January 24, 1972, defendant Lefkowitz submitted the Senate and Assembly reapportionment bill, Chapter 11 of the New York Laws of 1972, to the Attorney General of the United States. On March 14, 1972, the Department of Justice informed the State of New York that it was unable to rule on this new law until the state provided certain additional information as required by the Department's guidelines under Section 5 of the Voting Rights Act, 36 Fed. Reg. 18186, and that the sixty day period for objection set out in 42 U.S.C. § 1973c would not commence to run until that information was received. The State of New York has not provided the Attorney General of the United States with this requested information.

21. Defendant Lefkowitz has not submitted the Congressional reapportionment law, Chapters 76, 77 and 78 of the New York Laws of 1972, to the Attorney General of the United States.

22. The census information on which reapportionment was based was made available to the defendants and to the State of New York no later than September 1, 1971, pursuant to a special study prepared for this purpose by the Bureau of the Census. Had it sought to do so, the state of New York could have enacted reapportioned districts and submitted them to the Attorney General of the United States sufficiently early that the Attorney General's response thereto could have been obtained and, if adverse, acted upon, long before the time when those lines would normally be, or would need to be, implemented. The fact that it is now too late to obtain ap-

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proval from the Attorney General for the new districts in time to thereafter set up and hold new elections therein, with sufficient time for candidates to submit the required petitions and conduct meaningful campaigns, is due solely to the negligence or wilfulness of the State of New York and the defendants in failing to act with sufficient dispatch for the laws to receive timely consideration by the Attorney General of the United States.

23. Immediately after the enactment of the above mentioned Chapters 11, 76, 77 and 78, defendants commenced to enforce and implement them by issuing new maps of the Senate, Assembly and Congressional Districts, and by altering the lists of voters entitled to vote in such districts according to the new lines. On April 4, 1972, the defendants printed and began to distribute petition forms which candidates for election to the Senate, Assembly, Congress, party national conventions, and judicial conventions, must have signed by large numbers of voters in the newly defined districts in order for their names to appear on the ballot in the forthcoming primary election. These candidates are required to submit these duly signed petitions to the defendants on or before May 2, 1972. The defendants intend to hold primary elections on or about June 20, 1972, in these new districts, for nominees to the Assembly, Senate and Congress and for delegates to the national party conventions and the judicial conventions. Each of these steps enforcing Chapters 11, 76, 77 and 78 prior to their approval by the Attorney General of the United States is a violation of section 5 of the Voting Rights Act. Defendants intend, and will unless restrained, continue to violate the Act in this manner.

*Complaint***RELIEF**

24. Each of the plaintiffs and the persons similarly situated will be irreparably injured by the enforcement of Chapters 11, 76, 77 and 78, and is without adequate remedy at law.

WHEREFORE, plaintiffs demand

- (a) judgment in their favor that Chapters 11, 76, 77 and 78, Laws of New York of 1972, are in violation of section 5 of the Voting Rights Act,
- (b) a preliminary and permanent injunction restraining defendants from enforcing or implementing Chapters 11, 76, 77 and 78 until such time as the procedures for obtaining approval of such laws set out in section 5 of the Voting Rights Act have been followed and such approval obtained,
- (c) for the immediately impending elections and any succeeding elections occurring before defendants have obtained the requisite approval for new Assembly, Senatorial and Congressional district lines, that a special master be appointed to recommend to the Court alternative Assembly, Senatorial and Congressional district lines which will not, in purpose or in effect, deny or abridge the right to vote on account of race or color, and that the Court direct that all such elections to be held in or by Assembly, Senatorial or Congressional districts be held in or by such new districts as the Court shall direct pursuant to the recommendations of the special master.

Complaint

- (d) that this Court retain jurisdiction in this action until such time as defendants comply with section 5 of the Voting Rights Act,
- (e) that this Court award plaintiffs their costs and attorneys fees; and
- (f) that this Court grant such other and further relief as may be just and proper.

Dated: New York, N.Y.

April 7, 1972

/s/ JONATHAN SHAPIRO

JACK GREENBERG

JONATHAN SHAPIRO

ERIC SCHNAPPER

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Answer**(Filed April 7, 1972)****Civil Action No. 2419-71****(Title omitted)**

Comes now the applicants for intervention, by and through their attorneys, and answer as follows:

1. Applicants admit the allegations of paragraph 1 of the amended complaint, hereinafter referred to as the Complaint.
2. Applicants admit the allegations of paragraph 2 of the Complaint.
3. Applicants admit the allegations of paragraph 3 of the Complaint.
4. Applicants admit the allegation of the first sentence of paragraph 4 of the Complaint. With respect to the allegation in the second sentence of paragraph 4, the applicants admit that English-Spanish affidavits are now provided by the New York City Board of Elections but, on information and belief, aver that such affidavits were not provided prior to 1967.
5. Applicants admit the allegations of paragraph 5 of the Complaint, except in so far as the allegations refer to Article I, section 1 of the Constitution of New York, other than Article II, section 1.
6. The applicants are without knowledge or information sufficient to form a belief as to the allegation of paragraph 6 of the complaint, except as is set out in paragraphs 17-20 below.

Answer

7. Applicants admit the allegations of paragraph 7 of the Complaint in so far as it alleges the legal effect of the Voting Rights Act Amendments of 1970 but aver, on information and belief, that the suspension of literacy requirements was not uniformly implemented.

8. Applicants admit the allegations of paragraph 8 of the Complaint.

9. Applicants admit the allegations of paragraph 9 of the Complaint.

10. Applicants admit the allegations of paragraph 10 of the Complaint.

11. Applicants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 of the Complaint, except as set out in paragraphs 17-20 below.

12. Applicants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 of the Complaint. Applicants aver that if only a small number of persons failed the literary tests this was because non-white potential voters were deterred from even taking the test for the reasons set out in paragraph 17 below.

13. Applicants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13.

14. Applicants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14.

Answer

15. Applicants are without information or knowledge sufficient to form a belief as to the truth of the allegations of paragraph 15.

16. Applicants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the Complaint, except to the extent set out in paragraphs 17-20 below.

17. The literary tests administered by the state of New York during the last 10 years were generally conducted in such a manner in the non-white communities as to humiliate persons who had difficulty passing those tests or who failed those tests. This practice was well known throughout the non-white communities, and deterred potential voters from seeking to register. Virtually all the persons administering these tests were white, even in the non-white communities, due in part to discriminatory tests used by New York in certifying teachers. Potential voters were particularly reluctant to risk such humiliation at the hands of white literacy examiners because racial gerrymandering of Assembly, Senatorial and Congressional districts was so widespread and successful as to give most non-white voters little chance to influence elections held in such districts.

18. The rate of illiteracy, actual and functional, in the counties of Bronx, New York and Kings, was and is substantially higher among non-white persons of voting age than among white persons of voting age.

19. With regard to adults who were educated in the state of New York, the difference in the literacy rates is the result, inter alia, of differences in the quality of the

Answer

public education afforded to white and non-white children during the decades when persons now adults were growing up. The inferior quality of the education afforded non-white children resulted from a variety of actions by the state of New York, leading to the creation of all non-white schools or school districts, discrimination against non-white applicants for teaching and supervisory positions in the public schools, differences in the per capita expenditures in white and non-white schools and school districts, differences in the training, experience, salaries and abilities of teachers in white and non-white schools and school districts, and a lack of incentives for non-white children to remain in school.

20. With regard to black adults who were educated outside of the state of New York, the vast majority of these were educated in southern states in which they were subjected to discrimination and inferior education on account of their race or color and often required to attend all black schools pursuant to state established school segregation.

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Affidavit of John G. Proudfit**(Filed April 12, 1972)****Index No. 2419-71****[Title Omitted]**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.: , ,

JOHN G. PROUDFIT, being duly sworn, states as follows:

I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York. I am familiar with the proceedings had heretofore in this action. I make this affidavit in opposition to the motion to intervene as defendants made by the applicants for intervention.

The complaint in this action was filed on December 3, 1971. Shortly thereafter information about the filing of the complaint was requested by the Washington Post and early in February an article appeared in the New York Times.

On January 31, 1972 a motion was filed on behalf of defendant requesting additional time of 90 days within which to file an answer or other pleadings. This motion was thereafter withdrawn when plaintiff stipulated to an additional 30 days. Defendant's thereafter requested an additional 5 days which was granted by stipulation. On March 10, 1972 the defendant's answer was filed.

This action has been pending for over 4 months. During this period investigators and attorneys from the Justice Department have been going through records and conducting interviews in the three named Counties in this action, and on numerous occasions plaintiff's attorneys

Affidavit of John G. Proudfit

provided information and assistance upon request of the attorneys for the Department of Justice. The applicants for intervention were *clearly* on notice that this action had been instituted (in his affidavit in support of the motion Mr. Schnapper merely states that he was informed of the present action on March 21, 1972, but does not state that he had no prior knowledge).

The motion clearly does not meet the requirement of timeliness imposed by Rule 24 of the Federal Rules of Civil Procedure. Furthermore, the belated attempt to claim that because the applicants for intervention thought that the Justice Department would not consent to the plaintiff's motion for summary judgment that they took no action, should not be accepted as an excuse by this Court.

Applicants for Intervention had a period of over *four* months in which to present evidence, *if they had any*, to the Justice Department on how plaintiff had used its literacy tests to deny any person's right to vote on account of race or color.

Applicants do not allege any facts of discrimination other than a general allegation of educational inequality in their Points of Law and proposed Answer. No where is there *any* factual evidence supporting such charge.

None of the applicants for intervention alleges that he has been discriminated against by reason of the application of the literacy test, and in fact, *all* of the named individual applicants for intervention according to motion papers are *qualified* voters in the State of New York.

The motion by the applicants for intervention *clearly* shows that its real purpose is *not* to challenge the application of the literacy test which is central to this action, but that applicants for Intervention are seeking to attack

Affidavit of John G. Proudfit

New York State's recent reapportionment of its Assembly, Senate and Congressional Districts. Proof of this is the fact that applicants for intervention are *one* and the same as the plaintiffs in the class action commenced in the District Court in the Southern District of New York. Furthermore, applicants' remedy against the claimed discriminatory reapportionment under Section 1983 of the Civil Rights Act would in no way be barred by this Court's granting plaintiffs' motion for summary judgment.

Finally, the instant motion will clearly result in the undue delay and prejudice contemplated by Rule 24(b) of the Federal Rules of Civil Procedure. Plaintiff from the commencement of this action has sought a quick resolution because of the impending primary elections on June 20, 1972. Pursuant to the State Law this primary election procedure commenced on April 4, 1972 with the first day for signing designating petitions. Filing of these petitions will occur on May 8-11, followed by amongst other specific dates May 16, for accepting or declining designations, May 19 for filling vacancies, and June 5 for Certification by the Secretary of the State.

A delay on adverse decision by this Court with respect to plaintiff's action, not only will jeopardize the selection of candidates for the Assembly, Senate and Congress, but also the selection of delegates to the National Convention in the Democratic primary. Delegates to the Convention are chosen upon the basis of the Congressional Districts.

Although the New York State Attorney General submitted the new Assembly and Senate district lines to the Justice Department on January 24, 1972, I have been informed that the Justice Department did not conduct an examination into these new lines for six weeks there-

Affidavit of John G. Proudfit

after, since it was believed that the instant action might obviate the necessity for such examination. Further delay in the instant action coupled with the time consuming process of requiring the Justice Department to investigate the new Assembly, Senate and Congressional lines would make it unlikely that a June primary could take place in New York State on District lines based on the 1970 Census figures.

For the foregoing reasons it is respectfully submitted that the motion for intervention is untimely, that it is without merit, that intervenors are not injured parties, and that granting of such motion would cause undue delay and prejudice to the plaintiff.

WHEREFORE, it is respectfully requested that the motion to intervene be denied and that plaintiff's motion for summary judgment be granted.

/s/ JOHN G. PROUDFIT
JOHN G. PROUDFIT

(Sworn to April 11, 1972.)

Order of the District Court
(Filed April 13, 1972)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 2419-71

**NEW YORK STATE, on behalf of New York, Bronx
and Kings Counties,**

Plaintiff,

VS.

UNITED STATES OF AMERICA,

Defendant,

**N.A.A.C.P., NEW YORK CITY REGION OF NEW YORK STATE
CONFERENCE OF BRANCHES, et al.,**

Applicants for Intervention.

This matter came before the Court on Motion by plaintiff, New York State, for Summary Judgment, a response by defendant, United States of America, consenting to the entry of such judgment, and a Motion to Intervene as party defendants by the N.A.A.C.P., New York City Region of New York State Conference of Branches, et al.

Upon consideration of these Motions, the memoranda of law submitted in support thereof, and opposition thereto, it is by the Court, this 12th day of April 1972,

ORDERED that said Motion to Intervene as party defendants by N.A.A.C.P., New York City Region of New York

Order of the District Court

State Conference of Branches, et al. should be and the same hereby is denied, and it is

FURTHER ORDERED that the Motion for Summary Judgment by plaintiff, New York State, should be and the same hereby is granted.

/s/ EDWARD ALLEN TAMM

/s/ WILLIAM B. JONES

/s/ JUNE GREEN

FILED

APRIL 13, 1972

JAMES F. DAVEY, Clerk

Motion to Alter Judgment**(Filed April 24, 1972)****UNITED STATES DISTRICT COURT****DISTRICT OF COLUMBIA****Civil Action No. 2419-71****[Title Omitted]**

Applicants in the above mentioned action move the Court to alter or amend the order and judgment entered in this action on April 13, 1972, in so far as said order and judgment deny applicants' motion to intervene and grant plaintiff's motion for summary judgment, on the following grounds:

1. Plaintiff's memorandum and affidavit in opposition to intervention, which were filed with the Court on April 11 or 12, 1972, were not received in the mail by applicants' counsel until the morning of April 13, 1972, after this Court had read that memorandum and affidavit and ruled on the questions at issue. This delay in actual service denied applicants any opportunity to respond to the legal and factual issues raised by plaintiff.
2. Neither applicants nor their counsel knew of this action until at least March 21, 1972, and applicants acted with all possible dispatch to seek to intervene upon learning that the United States would not seek to represent their interests. Under the circumstances not only was the motion to intervene filed on April 7, 1972, timely, but it would have been premature had it been filed earlier than April 3, 1972.
3. Census data and governmental and private studies of illiteracy and educational opportunities in the 3 counties

Motion to Alter Judgment

covered by the Act demonstrate conclusively that the education afforded non-white children by plaintiff was substantially inferior to that afforded to white children, and that this difference resulted in disparities in white and non-white illiteracy rates among persons otherwise eligible to vote in those counties during the 10 years prior to the filing of the instant action. Under these circumstances a full evidentiary hearing is required before making any finding of fact as to whether plaintiff's literacy tests discriminated on the basis of race, and applicants' motion for intervention should have been granted.

4. In view of the Court's special fact finding responsibilities under the Voting Rights Act, and of the substantial public interest which this action will affect, the Court should not have approved the consent judgment desired by plaintiff and defendant without first soliciting the intervention of responsible interested parties and requiring the United States to undertake a more thorough investigation of the relevant facts.

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Points and Authorities**(Filed April 24, 1972)****UNITED STATES DISTRICT COURT****DISTRICT OF COLUMBIA****Civil Action No. 2419-71****[Title Omitted]**

Applicants offer this memorandum of points and authorities in support of their motion to alter this Court's order and judgment of April 13, 1972.

I. The Motion for Intervention Was Timely.

Plaintiff argues at great length that the motion for intervention is untimely because applicants or their counsel may have known of this action for the last four months. This argument is defective for three reasons. First, as is shown by the supplementary affidavit of Eric Schnapper, applicants and their counsel did not know of this case until March 21, 1972. There is no provision in the Federal Rules of Civil Procedure for notice by publication of a story in the Washington Post and New York Times, nor could these be consistent with due process. Second, even if applicants and their counsel had had such knowledge, their special interest in the instant proceeding arose out of the New York reapportionment laws, which were only completed on March 28, 1972. Hence they not only had no special reason to intervene before that date, but a motion prior thereto might well have been premature. Third, prior to April 3, 1972, there was no reason to doubt that the United States would adequately protect applicants interests, and a motion to intervene prior to April 3 would likewise have been premature.

Points and Authorities

The record in this case shows that the State of New York waited 7 months after being placed under sections 4 and 5 of the Voting Rights Act before filing the instant action, and that another 4 months elapsed before the motion for summary judgment came to a head. By comparison, the application for intervention was filed 51 hours after applicants' counsel learned the United States had consented to the motion for summary judgment and 27 hours after prompt filing was requested by this Court.

Plaintiff expresses concern that if their motion for summary judgment is not granted at once the elections in New York may be affected, i.e., that applicants' New York action will succeed. This predicament is of plaintiff's own making. Plaintiff delayed 7 months in bringing the instant action, consumed half a year in enacting its new apportionment laws, and then failed to obtain timely approval of the Department of Justice for those laws. Plaintiff's only hope of escape from the natural consequences of these actions is to persuade this Court to forgo any evidentiary hearing and to agree to its motion, uncontested by the United States, for summary judgment. Although plaintiffs seem to regard as an aberration the holding of such a hearing prior to any judicial finding of fact, such a hearing is, rather, normal American judicial practice.

II. There Is Sufficient Evidence of Discriminatory Effect of the Literacy Tests to Warrant Intervention.

In their Memorandum in opposition to intervention, plaintiffs urge that applicants must offer both hard allegations as to discriminatory use or effect of the literacy tests and evidence of such use or effect as well. •

Detailed allegations as to both discriminatory use and effect are contained in paragraphs 17-20 of applicants

Points and Authorities

proposed Answer. Those allegations are sufficiently particular to warrant intervention, especially in view of the short period of time in which applicants were asked to submit their motion and supporting papers.

The factual questions as to discriminatory effect of the literacy tests are tremendously complex. Inquiry should be made, with regard to a period running back at least to the turn of the century, as to a wealth of factors which might bear on the equality of educational opportunity: per capita expenditures, extent of de facto segregation, segregation within individual schools, experience and training of teachers, age and condition of building, size of classes, availability of special facilities, over-crowding or double sessions, discrimination by professional staff, discrimination in the selection or promotion of school employees, etc. No one would seriously contend that applicants could or should have developed a detailed factual record in this regard in the brief period of time in which the motion for intervention had to be filed.

A. The Unequal Educational Opportunities Afforded White and Non-White Students is Well Documented.

A sufficiently substantial amount of governmental and semi-official studies are available documenting the unequal educational opportunities afforded whites and non-whites in the three affected counties to warrant a full scale judicial inquiry. Several such reports are appended hereto as exhibits A-G. Exhibit A is an article prepared by the staff of the New York City Municipal Reference Service and published in the Bulletin of the New York Public Library which surveys the history of Negro education in the city covering both the de jure segregation which persisted at least until the late nineteenth century and the

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de facto segregation which emerged in the early twentieth. Exhibit B is a study of Negro school children in Manhattan prepared for the Board of Education by an employee of the Public Education Association in 1915 detailing discriminatory attitudes by white teachers and supervisors and the inadequacy of social services provided to Negro children by the schools. Exhibit C is the relevant portions of the report of the Mayor's Commission on Conditions in Harlem detailing the inferior school system which contributed to the Harlem riots in the mid-1930's. Exhibit D is a systematic study of the inferior equality of education afforded non-whites prepared in 1955 by the Public Education Association at the request of the New York City Board of Education. Exhibit E is a New York court decision in 1958 holding that the city schools for non-white children were inferior to those for white children. Exhibit F is a report by a civic group in Bronx County as to per capita expenditure and other differences between the twelve worst elementary schools in the county, all located in the South Bronx ghetto, and the twelve best schools, all located outside it. Exhibit G is the result of a computer study of official data on New York City Schools prepared by a private research organization.

As might be expected, the most detailed and quantitative studies are the most recent ones. These studies offer evidence not only as to conditions as of when they were prepared, but also are indicative of the situation years earlier since which, according to officials, things have markedly improved.

The Court's attention is also directed to the recent decision in *Chance v. Board of Examiners*, 330 F. Supp. 203 (S.D.N.Y., 1971), in which the District Court held that the examinations used by the 80 year old Board of

Points and Authorities

Examiners of the City of New York discriminated against non-white applicants for supervisory positions in the public school system.

The deleterious effect of de facto segregation *per se* is of course well known. See e.g., Coleman et al., *Equality of Educational Opportunity* (1966); U.S. Civil Rights Commission, *Racial Isolation in the Public Schools* (1967).

B. The Differences in Educational Opportunities Afforded Whites and Non-Whites Resulted In Substantial Differences in Illiteracy Rates.

This disparity between the educational opportunities afforded whites and non-whites manifests itself all too clearly in the respective educational levels attained by the two groups.¹

Since the beginning of the century the proportionate number of non-white children not attending school has consistently exceed that of white children.

¹ The meaning of the census data used below is complicated by the fact that the Census Bureau used different forms over the period in question. It is necessary to compare, for example, illiteracy among persons over 10 (1930), with years of school completed by persons over 14 (1940) and over 25 (1960). Some data is for urban New York State, some for New York City, and some for individual counties. Sometimes all non-whites are lumped together and sometimes they are not. The overall statistical picture is nonetheless clear.

Points and Authorities

Table 1

Number of children per 1,000 aged 7 to 13, not enrolled in school in New York City:³

	<i>White</i>	<i>Non-White</i>	<i>Percentage Difference</i>
1910	58	83	43%
1920	59	66	12%
1930	23	33	43%
1940	28	34	21%
1950	53	55	4%
1960	30	48	60%

Among the children who did attend school, non-white children were consistently behind their white peers. In 1950, the earliest year for which such census data is available, the proportion of non-white children more than one grade behind their age group (i.e. eight year olds in first grade, nine year olds in first and second grades) was uniformly higher than that of white children.

³ Source: Census of 1920, *Characteristics of Population of New York*, p. 676, table 2 (data for 1910 and 1920 is for New York urban population, which included but was not limited to New York City); Census of 1940, *Characteristics of Population of New York*, pp. 167, 172, 179, tables D-38, E-38, F-38 (data for 1930 and 1940 is aggregate of data for Bronx, Kings and New York Counties); Census of 1950, *Characteristics of Population of New York*, V.32, pp. 189 and 220, tables 51 and 63; Census of 1960, *Characteristics of Population of New York*, V.34, pp. 449-451, Table 101.

Points and Authorities

Table 2

Number of children per 1,000 aged 7 to 13, more than one grade behind in school, in New York City.¹

<i>Age</i>	<i>All males</i>	<i>Non-white males</i>	<i>Percentage Difference</i>
8	17	29	70%
9	38	63	66%
10	60	100	67%
11	74	133	79%
12	80	173	116%
13	96	200	108%

<i>Age</i>	<i>All females</i>	<i>Non-white females</i>	<i>Percentage Difference</i>
8	18	40	122%
9	33	45	36%
10	54	86	59%
11	61	106	74%
12	64	124	94%
13	78	147	88%

Among students enrolled in school and in each particular grade, non-white children are consistently behind white children in reading skills. Although reading ability has only recently been broken down according to race, there is no reason to assume this situation improved over the period in question. A study of 284 of a total of 557 elementary

¹ Source: Census of 1950, Characteristics of Population of New York, V.32, pp. 189 and 220, tables 51 and 63.

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schools in New York City from 1966 to 1969, prepared by the Center for Urban Education and published in the Columbia Journal of Law and Social Problems yielded the following results. For grades two through six, the average reading scores for schools that were 70% or more black were slightly more than a year ($-.53$) behind the national norm for each grade each year. The scores for schools that were 70% or more Puerto Rican were almost a year behind ($-.92$). The scores for schools that were 70% or more white were almost a full year ahead of the national norm ($+.97$). Thus the average gap between the 70% or more black schools and the 70% or more white schools was equivalent to a year and a half of reading achievement compared to the national norm, and the gap between 70% or more Puerto Rican schools and those white schools was almost two years. Most significantly, the gaps between these schools *widened* the longer a child remained in school. Each year the average student in a 70% or more black or Puerto Rican school fell a third of a year (.35 and .39 respectively) behind his counterpart in a 70% or more white school. Comment, Columbia Journal of Law and Social Problems, V.6, p. 374, 387-388, n.115. The Report of the United Bronx Parents, cited earlier, showed that all of the 12 worst Bronx elementary schools, measured by reading scores, were less than 20% white, and all but one of the 12 best schools were at least 60% white. *Distribution of Educational Resources Among Bronx Schools*, pp. 2-3. This impact of inferior educational facilities on non-white students in New York City has already been recognized by at least one court. In *Council of Supervisory Association of the Public Schools of New York City v. Board of Education of the City of New York*, 23 N.Y. 2d 458, 463, 297 N.Y.S. 2d 547, 551, 245 N.E. 2d 204, 207, modified on

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appeal 24 N.Y. 2d 1029, 302 N.Y.S. 2d 850, 250 N.E. 2d 251 (1969), the court found:

[T]he initial handicap of the nonwhite child, when he first came to school . . . was not redressed under the ministrations of the public schools. It got worse. At the end of the eighth grade the nonwhite child was relatively further behind his white fellow pupil than he had been at the beginning; at the end of the 12th grade the disparity increased.

This discrimination against non-white children in the schools of New York City predictably resulted in disparities in the literacy rates of white and non-white adults. The last year in which the Bureau of the Census obtained information on illiteracy as such was 1930. The census of that year showed a tremendous difference in the literacy rates among native-whites, negroes, and other races (primarily Chinese and Puerto Ricans).

Table 3

Illiteracy in population 10 years old and over, by color, in per cent.⁴

	<i>Native-White</i>	<i>Negro</i>	<i>Other</i>
New York City	.4	2.1	22.9
Bronx County	.2	1.3	16.2
Kings County	.1	2.8	16.3
New York County	.8	1.9	27.0

⁴ Source: Bureau of the Census, *Negroes in the United States, 1920-1932*, p. 252, Table 35.

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The population of New York City over 10 in 1930 would have been over 42 in 1962, and in 1962 persons over 42 accounted for 50% of the voting age population. *Statistical Abstract of the United States*, 1968, p. 25, table 25.

In 1940 the Census Bureau, instead of soliciting information on illiteracy, asked instead the number of years of school which each person had completed, and all persons with less than five years of school completed were considered actually or functionally illiterate. Folger and Ham, *Education of the American Population*, 111-126 (1967). The proportion of non-whites with less than 5 years of school substantially exceeded that for whites.

Table 4

Persons 25 years old and over, by years of school completed in 1940, in per cent.⁵

	Native White	Negro	Other
Bronx County—			
0 years	0.7%	4.2%	20.3%
1-4 years	1.6%	8.9%	12.6%
Under 5 years	2.3%	13.1%	32.9%
Kings County—			
0 years	1.2%	7.0%	26.5%
1-4 years	1.9%	13.8%	16.9%
Under 5 years	3.1%	20.8%	43.4%
New York County—			
0 years	1.1%	2.4%	28.7%
1-4 years	2.9%	12.9%	23.0%
Under 5 years	4.0%	15.3%	51.7%

⁵ Source: Census of 1940, Characteristics of the Population of New York, pp. 166, 173, 180, tables D-39, E-39, F-39.

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Since 1940 the Census Bureau has not distinguished between native whites and immigrant whites who did not attend American schools and who are not eligible to vote because of their lienage.⁶ That the differences in literacy rates have not changed substantially is readily inferred from the fact that non-white illiteracy has remained extremely high.

Table 5

Years of school completed by non-white 14 years old and over, in 1960, in per cent.⁷

	0 years	1-2 years	3-4 years	Under 5 years
Bronx County	2.3%	1.6%	5.5%	9.4%
Kings County	3.0%	2.0%	6.4%	11.9%
New York County	4.0%	2.2%	7.1%	13.3%

Even assuming that that rate of illiteracy among native whites did not decline at all from 1940 to 1960, the non-white illiteracy rate exceeded the white rate by a substantial margin. The factor by which white illiteracy was exceeded by the non-white rate in various years is set out below.

⁶ Since 1950, literacy has been a prerequisite in most cases to naturalization, *Petition of Contreras*, 100 F.Supp. 419 (S.D. Cal., 1961); 8 USC § 1423.

⁷ Source: Census of 1960, Characteristics of Population of New York, V.34, pp. 465-468, Table 103.

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Table 6

Factors by which non-white, Negro or others illiteracy rate exceed white illiteracy rate.

	<i>Bronx County Kings County New York County</i>		
Negro 1930/ Native White			
1930	6.5 x	28.0 x	2.4 x
Other 1930/ Native White			
1930	81.0 x	163 x	34 x
Negro 1940/ Native White			
1940	5.7 x	6.7 x	3.8 x
Other 1940/ Native White			
1940	14.3 x	14.0 x	12.9 x
Non-white 1960/ Native White			
1940	4.1 x	3.7 x	3.3 x

In *Gaston County v. United States*, 288 F.Supp. 678, 687 (D.C. Cir., 1968), the illiteracy rate, defined as less than 5 year of education, was 17.4% among whites and 30.1 per cent among Negroes. In that case, because the Negro rate of illiteracy exceeded the white rate by a factor of 1.7x, that difference was sufficient to prompt the Court to hold that the County's literacy test had discriminated in effect against Negroes. A fortiori the same conclusion is required here when the difference between white and non-white literacy rates is 2 to 96 times greater than in Gaston County.

*Points and Authorities**III. Even in the Absence of this Application For Intervention, the Court Should Not Have Entered the Judgment Sought by Plaintiff.*

An action such as this one, to exempt three counties with a combined population of several million from the protections of the Voting Rights Act, is not like an ordinary civil action. In such a typical civil action the parties are free to settle the case on any terms they please at any time, just as they might have settled their differences without ever coming to court. The instant action differs from such causes in two vital respects. First, the parties were never at liberty to negotiate a settlement without resort to litigation; the law explicitly requires an independent judicial determination that literacy tests have not been used with the purpose or effect of discrimination before an exemption may be granted. Second, the Department of Justice, like a private attorney in a class action, must represent not only its nominal client, the United States, but the public interest as well; the Court must scrutinize the adequacy of the Department's advocacy of the public interest, and particularly any attempted compromise or waiver thereof to guard against any failure of responsibility by or conflict of interest facing the government's attorneys.

In the instant action the United States asks the Court to make the required findings of fact without seeking to offer any evidence to the contrary. The Court's judicial responsibility under the Voting Rights Act requires that it take two steps before entering such findings. First the Court should ascertain whether it is likely that other groups or persons, not yet parties to the action, might wish to offer evidence in opposition to the findings sought. Such information can be obtained by inquiring of the government, or ascertaining from its papers, what contact took place

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between the United States and possibly interested parties. Where it appears there may be responsible persons or organizations willing to litigate the issues before the Court, their intervention should be explicitly invited by the Court just as the brief of an amicus is occasionally solicited. Second, even where no such potential litigants exist, the Court should inquire whether the government has exercised due diligence in pursuing every reasonable investigation to unearth and present to the Court facts which might tend to militate against the requested finding. Where such diligence has not been used, the Court should direct further inquiry by the United States.

These two duties are imposed upon the Court by section 4 of the Voting Rights Act by virtue of its responsibility to make an independent and informed judicial determination as to certain facts. The Court cannot carry out that responsibility by merely accepting the judgment of the United States that the requested relief is warranted; it must take every reasonable step to assure that the findings it makes are well founded on the relevant facts. The Court's duties here are analogous to that of a trial judge confronted by a defendant who seeks to plead guilty. Although both the prosecution and defense may want the plea accepted, such a judge must in the interest of justice ascertain independently of them that the plea is knowing and voluntary.

The same duties must be borne by the Court in any action such as this one affecting the public interest, regardless of any special statutory fact finding responsibilities. The United States has virtually unlimited discretion in deciding whether to initiate a civil or criminal action, but once such a dispute is brought into court the judiciary as well as the executive branch must be satisfied that any

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proposed resolution of the controversy is just and fully warranted by the facts.

It is readily apparent from the papers in this case that, wholly aside from applicants, there are responsible individuals and organizations affected by the proposed judgment who might wish to offer evidence to the Court. The affidavit of Mr. Norman recites no effort by the United States to contact or interview persons or groups who would want to offer it or the Court evidence in opposition to the proposed judgment. The affidavit recites vaguely that interviews were conducted with "election and registration officials and . . . persons familiar with registration activity in black and Puerto Rican neighborhoods," page 2, but for all that appears every person interviewed may have been an employe or agent of the plaintiff in the instant action. Under these circumstances the Court should have directed the United States to prepare a list of responsible persons and organizations and to write each of them, advising them of the status of the proceeding and inviting them to seek to intervene.

It is even more apparent from the papers in this case that the United States has been derelict in its fact finding responsibility. In an action such as this one the state must establish that its literacy tests were not used with the purpose or the *effect* of discriminating on the basis of race or color. With regard to the latter requirement the crucial evidence is whether the illiteracy rate was higher among non-whites than among whites, and whether such a difference may have been caused by differences in the educational opportunities afforded whites and non-whites. *Gaston County v. United States*, 288 F.Supp. 678 (D.C. Cir., 1968), 395 U.S. 285 (1969). It is clear from the record in this action that the United States, which inquired with

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such diligence into literacy rates and educational discrimination when sued by Gaston County in 1966, made absolutely no such inquiry when sued by the state of New York in 1971. This failure is particularly difficult to understand in view of the fact that the inferior nature of ghetto schools in New York City is common knowledge. Under these circumstances the Court should have declined to enter the requested judgment and directed the United States to inquire into relevant facts.

Conclusion

For these reasons applicants motion to alter the order and judgment of April 13, 1972, should be granted.

Respectfully submitted,

JACK GREENBERG

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Counsel for Applicants

Affidavit of Eric Schnapper

(Filed April 24, 1972)

Civil Action No. 2419-71

[Title Omitted]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

ERIC SCHNAPPER, being duly sworn, deposes and says:

1. I am counsel for applicants for intervention in the above mentioned action.

2. Prior to March 21, 1972, I had no knowledge whatever of the commencement, pendency or existence of this action.

3. Throughout the months of December, 1971 and January and February, 1972, I was in the state of New Hampshire. The daily paper which I regularly read there was the Concord Daily Monitor and Patriot, and it carried no story about the instant action.

4. To the best of my knowledge neither my co-counsel nor any of the applicants for intervention knew of the commencement, pendency or existence of this action prior to March 21, 1972.

5. The affidavit and memorandum submitted by the plaintiff in opposition to the motion for intervention were delivered to my office by the United States Post Office on the morning of Thursday, April 13, 1972, after this Court had already read that affidavit and memorandum and ruled on applicants' motion.

Affidavit of Eric Schnapper

6. At approximately 3:00 p.m. on April 5, 1972, I was informed for the first time by Mr. Kieth of the Department of Justice that two days earlier the United States had consented to the motion for summary judgment filed by the state of New York. On April 6, 1972, I spoke twice by telephone with Judge Green's law clerk. I indicated that applicants would seek to intervene in the instant action, and he requested that all papers be filed by the next day, April 7, 1972. I drafted and typed papers in the instant action and in *NAACP v. Board of Elections* throughout the night of April 6-7, and filed the complaint and summons in *NAACP v. Board of Elections* prior to noon on April 7. I then flew to Washington, D.C., and for the first time was able to examine the papers filed by the plaintiff and defendant in this action at approximately 3:00 p.m. in the reception room to Judge Green's chambers. After further drafting, modifying and typing applicants' papers in the light of the contents of the papers of the plaintiff and defendant, I delivered applicants' motion and supporting papers to Judge Green's clerk at approximately 6:00 p.m. on April 7, 1972.

/s/ ERIC SCHNAPPER
Eric Schnapper

(Sworn to April 24, 1972)

THE STATUS OF THE PUBLIC SCHOOL EDUCATION OF NEGRO AND PUERTO RICAN CHILDREN IN NEW YORK CITY

Presented to:

The Board of Education Commission on Integration

Prepared by:

**The Public Education Association assisted by the
New York University Research Center for Human Relations**

Requested by:

**Col. Arthur Levitt,
President of the New York City Board of Education**

October, 1953

**THE STATUS OF THE PUBLIC SCHOOL
EDUCATION OF NEGRO AND PUERTO RICAN
CHILDREN IN NEW YORK CITY**

1. Introduction

History

On June 21, 1954, at the annual dinner of the Urban League, Colonel Arthur Levitt, then President of the New York City Board of Education, pledged the Board of Education to a fight against ethnic discrimination in the New York City School System. At the same dinner, Kenneth B. Clark, Associate Professor of Psychology at City College, reiterated statements concerning the problems of ethnic separation in the City's schools, which he had made on other occasions. In essence he suggested:

1. That there is a serious teacher turnover in schools which are populated primarily by Negro and Puerto Rican children.
2. That there is a discrepancy between the number of classes for the mentally retarded and the intellectually gifted in these same schools.
3. That educational standards are lower in Negro and Puerto Rican schools and that facilities are inadequate.
4. That school officials have on occasion been guilty of gerrymandering school districts to the disadvantage of Negro and Puerto Rican children.

The following day President Levitt of the Board of Education called and then wrote President Nichols of the Public Education Association and suggested to him that the Public Education Association conduct a "full, impartial and objective inquiry" into the status of the public school education of Negro and Puerto Rican children in New York City. He asked that this be done "for the purpose of aiding all concerned in the attainment of the ultimate goal: the completely integrated school."

The Board of Trustees of the Public Education Association agreed to accept the responsibility for making an investigation and a committee headed by Mrs. Morris Shapiro was created to implement Colonel Levitt's request into action. The Public Education Association also formulated the following statement of principle to direct its efforts with respect to the inquiry:

STATEMENT OF PRINCIPLE

Racial segregation in our public schools, based on the concept of "separate but equal" facilities, denies the basic right of every American child to equality of educational opportunity. As such, segregation strikes hard at the roots of democratic society. The Supreme Court decision of May 17, 1954, outlawing segregation in the schools, was a historic reaffirmation of this truth. It states:

"Segregation with the sanction of the law . . . has a tendency to retard the educational and mental development of Negro

children and to deprive them of some of the benefits they would receive in a racially integrated school system."

Justice Warren further stated:

"To separate them (Negro children) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

It remains for the American people to increase their efforts to wipe out segregation, illegal or defacto, until no trace of the blight remains in our educational system. In New York City, with its millions of inhabitants of every race, creed and color, it is especially important to investigate all reports of segregation and eliminate it where it is found to exist. This is a job for both our school authorities and the community as a whole.

The city's Board of Education has shown its desire to achieve this objective by requesting the Public Education Association to conduct a survey of alleged segregation in our school system. And on our part, the Public Education Association, as a community organization, accepts the assignment gladly, in the hope that an impartial investigation will help to further the cause of free, equal and democratic education which is the foundation of our national life.

• • •

Mrs. Shapiro's committee enlisted the assistance of the New York University Research Center for Human Relations. The Center guided the research and presented a report which is the foundation for the one that follows. Staff members of the Center who participated were Marie Jahoda, Stuart W. Cook, Isidor Chein, Richard Maisel and June Christ. The members of Mrs. Shapiro's committee and volunteers whom the committee enlisted collected the data which were necessary for the investigation.

In all of their contacts with members of the staff of the New York Public School System, the researchers were met with a fine spirit of co-operation. Superintendent Jansen instructed his staff to provide all necessary information and to assist wherever possible in the collection of necessary data. Teachers and school administrators demonstrated an awareness of the problem being studied and exhibited a sincere interest in the welfare and the education of Negro and Puerto Rican children in their schools.

The study staff is grateful for the assistance of volunteers⁸ without whose help much of the data could not have been collected.

The Fund for the Republic financed a portion of the cost of the study and the Public Education Association financed the remaining portion.

Purpose and procedure

The study examined the relative position, with respect to educational opportunities received, of Negro and Puerto Rican schools in the New York school system, and investigated the status of Negro and Puerto Rican integration into the schools. It conducted its investigations with respect to these questions under the following heads:

The Issue of Equal Educational Opportunity

The Issue of Zoning.

The PEA report presents the findings of the New York University Research Center for Human Relations' study as interpreted and augmented by the PEA Committee on Equality in Education.

The report drew upon the following sources for data:

1. Data furnished by principals and assistant superintendents
2. Data available in Board of Education reports and files
3. United States census reports
4. Reports of observations made by PEA committee and volunteers.

The report is organized under four sections:

1. Introduction
2. The Issue of Equal Educational Opportunity
3. The Issue of Zoning
4. The Data.

The Introduction has just been presented. Sections 2 and 3 present observations made from the data collected. Each observation is followed by a recommendation for action. The final section entitled "The Data" contains tables of data which substantiate the observations.

2. The Issue of Equal Educational Opportunity

The controversy

The question of whether Negro and Puerto Rican children are given an equal opportunity with other children in New York's public schools has been raised. The question seldom applies to individual Negroes and Puerto Ricans in a given school but suggests that, where they are concentrated in certain schools, the educational opportunities offered by these are not equal to those offered by other schools. This report essays to answer this question by comparing Negro and Puerto Rican schools with schools enrolling children of other ethnic origins.

Schools selected for comparison

New York City's public elementary and junior high schools are neighborhood schools. This means that children within a given com-

munity area of the city attend the school in that area. If the community population composition is of one ethnic origin, the schools of that community will reflect this condition in their school populations.

The report was interested in comparing two kinds of schools: schools composed primarily of continental white children and schools populated essentially by Negro and Puerto Rican children. It defines these schools as follows:

A continental white school is either an elementary or a junior high school in which the Negro and Puerto Rican school population is less than 10% of the total. For convenience we shall refer to such a school as a Group Y school.

A Negro and Puerto Rican elementary school is one in which the Negro and Puerto Rican population is 90% or more of the total school population. *A Negro and Puerto Rican junior high school* is one in which the Negro and Puerto Rican population is 85% or more of the total school population. We shall include both such schools in the category Group X schools.

All of the Group X schools (42 elementary and 9 junior high schools) were included in the study. A sample of 60 elementary schools was selected at random from the Group Y schools for the purpose of making comparisons. All of the Group Y junior high schools (15) were used for this purpose.

This report attempts to answer these questions with respect to the relative positions educationally of these two groups of schools:

1. Are the physical facilities available to Group X as good or equal to those provided Group Y children?
2. Are Group X schools maintained as well as Group Y schools?
3. Are teachers in Group X schools as competent as those in Group Y schools?
4. Are Group X schools served as well by the special school services as Group Y schools and are these services adequate according to their needs?
5. Are the per pupil expenditures in Group X schools the same as those in Group Y schools?
6. Is the average pupil achievement in Group X schools the same as Group Y schools?
7. Are the class sizes in Group X schools the same as those in Group Y schools?

The questions are answered in the order given above.

QUESTION

1. Are the physical facilities available to Group X as good or equal to those provided Group Y children?

ANSWER

1. *On the average, facilities in Group X schools are older and less adequate than those in Group Y schools.*

1.1—Group X school buildings are older than Group Y buildings. The average age of Group X elementary schools is 43 years while the average age of Group Y elementary schools is 31 years. The average age of Group X junior high schools is 35 years, while the average age of Group Y junior high schools is 15 years. (See Table 3.)

1.2—There is less square feet of floor space, site space, ground level space and playground space per child in Group X elementary schools than in Group Y elementary schools. The same is true for the junior high schools with the exception that the square feet of floor space per child is more for Group X schools at this educational level. (See Table 4.)

1.3—Despite these facts Group X schools are, on the average, larger (70,909 square feet) than Group Y schools (58,429 square feet).

1.4—In general, Group X schools are equipped with fewer special rooms than Group Y schools. (See Table 5.)

1.5—A questionnaire answered by the principals indicated that principals of Group X schools are less satisfied with the adequacy of their school's facilities than principals in Group Y schools. (See Table 6.) Fewer of them feel that their facilities are adequate and more of them indicate the need for "more" or "many more" facilities. (See Table 7.)

1.6—In general, principals in Group X schools are less satisfied with the teaching equipment available to them than are principals in Group Y schools. (See Table 8.)

QUESTION

2. Are Group X schools maintained as well as Group Y schools?

ANSWER

2. *On the average, Group X schools are not as well maintained as Group Y schools.*

2.1—Group X schools are older than Group Y schools but renovations and painting of school buildings have nonetheless not always compensated for this disadvantage. In elementary schools, an average of 9.8 years have gone by without renovation of Group Y schools; the average for Group X schools is 17.2 years. In junior high schools, it is .7 years on the average since the latest renovation of Group Y schools, while the figure for Group X schools is 4.3 years. Some schools visited were in very poor condition and were in need of complete renovation and possibly even reconstruction before they could be called satisfactory.

Observations and recommendations

Negroes and Puerto Ricans, in general, inhabit the older, well-established areas in the city, hence their children will be housed in the older schools. It must also be recognized that the need for new buildings is very great and that this need at present outweighs the need for replacement of older buildings. The surveyors, however, visited some buildings that were so antiquated that the condition of the building worked to the disadvantage of the educational efforts being made in it. It is felt that the schools of New York are rapidly reaching a stage when replacement of school buildings has become a serious problem. This is not a justification for poor maintenance of buildings, however.

QUESTION

3. Are teachers in Group X schools as competent as those in Group Y schools?

ANSWER

3. *If tenure, probationary and substitute status are measures of competency, Group X school teachers are not as competent as Group Y teachers because fewer of them are on tenure and more of them have probationary or substitute status. Also teacher turnover is more rapid in Group X schools than in Group Y schools. (See Tables 9, 10, 11.)*

Observations and recommendations

An unfortunate condition persists because teachers elect to teach in Group Y schools in preference to Group X schools: some Group X schools are listed as difficult schools, and teachers avoid these; Group Y schools are closer to teachers' homes; and a tradition has developed which seems to attach prestige to teaching in Group Y schools in preference to Group X schools. This report hesitates to recommend that personnel practices be modified to make transfers out of Group X schools more difficult but everything else should be tried to encourage experienced teachers to remain in Group X schools. Perhaps an increase in salary or such fringe benefits as lowered pupil-teacher load, better facilities, etc., might become inducements. It is suggested that the Board of Education re-examine all of its personnel practices to see what could be done to keep experienced teachers in Group X schools.

QUESTION

4. Are Group X schools served as well by the special school services as Group Y schools and are these services adequate to their needs?

ANSWER

4. *Quantitatively (in terms of number of visits by service personnel) Group X schools receive more services than Group Y schools. They have more special classes. (See Table 12.)*

4.1—The Board of Education provides classes for both gifted (IGC classes) and mentally retarded children (CRMD classes). Group X schools have more CRMD classes than Group Y schools. Group X schools, however, have fewer IGC classes. (See Table 13.) (The Board of Education is not establishing any more IGC classes pending a study of them.)

4.2—There are more special classes in Group X schools and their average size is smaller than those in Group Y schools. (See Table 14.)

Observations and recommendations

Based upon answers to the question "Have you had a visit from special service personnel this year?", Group X schools have had more service than Group Y schools. The need for special services in Group X schools is very great. The satisfaction of this need cannot be measured in terms of visits but in time spent. If the Board of Education wishes to satisfy the needs of Group X schools for special services, there will have to be significant expansion in these.

QUESTION

5. Are the per pupil expenditures in Group X schools the same as those in Group Y schools?

ANSWER

5. *There is no great discrepancy between the per pupil instructional and administrative cost in Y schools and X schools. In the maintenance category of the budget, Group Y elementary schools are favored over Group X schools but the reverse is true at the junior high level.*

5.1—It was not possible to obtain any significant figures relative to capital outlay per pupil. These vary greatly from year to year.

(*Capital Outlay:* The investment in school sites, the erection of new buildings, the installation of mechanical equipment, the purchase of furniture and equipment for new buildings, improvements for betterment of existing structures and equipment.)

5.2—The *maintenance of plant* costs per pupil in 1953-1954 was more for Group Y elementary schools than Group X elementary schools. At the junior high level, however, the maintenance of plant costs per pupil in Group X schools was higher than that in Group Y schools. (See Table 15.)

(*Maintenance of Plant:* Repairs and replacements to buildings and mechanical equipment; to furniture and instructional equipment, in order to maintain the system in a state of efficiency.)

5.3—The *operation of school plant* costs per pupil is less in Group X elementary schools than in Group Y elementary schools. At the junior

high level, however, the operation of school plant costs per pupil is more in Group X schools than in Group Y schools. (See Table 16.)

(*Operation of School Plant:* Custodial service, fuel, water, lighting and power, fuel inspection and other expenses of operation.)

5.4—The cost of instruction per pupil was substantially the same for Group X schools as for Group Y schools at both the elementary and the junior high school levels.

Although the *Annual Financial and Statistical Report* of the Board of Education gives school-by-school records of physical facilities and of expenditures for capital outlay, plant operation, and maintenance, no individual school accounts are kept for cost of instruction.

The Board of Education reports instructional costs of various programs only on a citywide basis and does not compile school-by-school figures. Nevertheless, the Superintendent of Schools made available for inclusion in this report the total annual cost of salaries and supplies for each of the schools studied as a basis for estimating the per pupil cost of operating the educational program.

The cost for Group X elementary schools ranged from \$133 to \$241, with an average of \$185. In Group Y schools, the range was wider, from \$129 to \$245, and the average was \$195.

At the junior high school level the slight difference was in favor of Group X schools. The range for these schools was from \$230 to \$320, and the average was \$252. Group Y Junior high schools ranged from \$204 to \$272, with an average of \$244.

No effort was made to allocate expenditures by the Division of Child Welfare (i.e., Bureau of Child Guidance, Bureau of Attendance, etc.) or by other city departments, such as the Department of Health (for school nurses, medical, and dental examinations) on behalf of children in these schools. (See p. 8 for evidence that Group X schools receive more of some types of special services than do Group Y schools.)

Two factors are particularly relevant to the interpretation of these estimates of cost of instruction per pupil. One, which is discussed under Question No. 3 (p. 8), is the condition of the staff with regard to turnover, tenure, probationary and substitute status. The other is the ratio of the number of pupils to the number of professional positions. On account of the larger number of special classes, this ratio is consistently in favor of the Group X schools. At the elementary level the average for Group X schools is 25.8 pupils per professional position, and 28.7 for Group Y. The differential is even greater at the junior high school level where the average for Group X is 19.4 and for Group Y, 22.7.

(*Cost of Instruction:* The salaries of teachers and principals and other professional staff members; expenditure for instructional supplies, books,

and equipment; personal service cost of after-school centers and evening community centers.)

5.5—The educational administration cost per pupil was not computed.

(*Educational Administration*: General and specific professional control of the educational side of the school system. The bureaus directly connected with instructional and extension activities. Office staffs.)

Observations and recommendations

The difference in maintenance of plant and operation of plant costs at the elementary level seems to substantiate what was suggested earlier in this discussion, that more money should be spent keeping Group X buildings in condition.

QUESTION

6. Is the average per pupil achievement in Group X schools the same as in Group Y schools?

ANSWER

6. *In terms of standardized tests in reading and arithmetic (in certain specified grades) it is not.* (See Tables 18 and 19.) It must be remembered, however, that a school strives to satisfy the educational needs of children in other areas of the curriculum as well as in reading and arithmetic. The investigation has no data to show how effective the schools were in developing better citizens, developing racial and religious understanding, improving hygiene and health, and in fostering moral values. No test results in English, the Social Studies, and Science were available for study.

To judge the success of teaching on reading and arithmetic tests alone is unfair. On the other hand, such judgments have been made and the accusations implied in them must be answered. The school system has replied by suggesting that children in Group X schools do not test as high in general ability tests as children in Group Y schools and that the teachers have done as well as, or better than, might be expected. This does not close the argument, however, for many experts insist that the tests of general ability merely reflect what has been learned and that children weak in reading, in language, in awareness of the American culture or in bookish learning will do poorly in a test of general ability. The very fact that a child does not do well in a general ability test might in itself be a symptom of instructional weakness.

Observations and recommendations

The question as to what is really being tested cannot be answered with unanimous agreement about the answer. The issue of what tests of

general ability measure is an important one to resolve. The New York City schools are making efforts in this area. It is suggested that they carry on in these efforts and expand them. PEA would be pleased to collaborate with the Board of Education in approaching a foundation for funds to carry on experimentation concerning the significance of achievement tests and general ability tests in cities of highly heterogeneous population.

QUESTION

7. Are the class sizes in Group X schools the same as those in Group Y schools?

ANSWER

7. *If special classes (CRMD and IGC) are included, the class sizes in Group X schools are somewhat smaller than those in Group Y schools. If special classes are not included in the statistics, the average class size of Group X schools is larger than that of Group Y schools.*

7.1—The Board of Education sets an optimum class size of 32.4 for typical schools and 28 for difficult schools. (90% of the Group X schools are in the "difficult" category.) It also limits the size of special classes. Inclusion of these categories will naturally lower the overall average class size.

7.2—The average class size of Group X elementary and junior high schools is 30.0 pupils; of Group Y elementary schools 31.7 and Group Y junior high schools 32.9 special classes included.

7.3—If the difficult schools are separated from the typical schools, at the elementary level, the average size of classes in difficult Group X schools is 34.2, in difficult Group Y schools 29.5. In typical schools for Group X it is 35.1 and for Group Y 31.1 (special classes not included in these figures).

Observations and recommendations

Educational research has not come up with much information concerning what a difference of a few students in class size means in terms of educational productiveness. It is generally agreed that problems of classroom control increase with class size and that students cannot receive the proper personal attention of a teacher when the class is large. It would seem that in the so-called "difficult" schools class sizes should be further reduced since it is almost universally agreed that class sizes beyond 25 are not desirable even in typical school situations. The Board of Education has made provision for reducing class sizes in this year's budget.

Reliability and meaning of the data

The facts just presented are based upon averages. Averages as measures of central tendencies do not portray the exceptions. There are Group X schools above the average of Group Y schools and Group Y schools

below the average of Group X schools. Consider for example the Group X school described below.

The economic status of the children is low as indicated by the fact that 16% of them receive free lunch. The principal, who has been in the school for many years, estimates that 30% of the school community's families have an income of less than \$2,000 per annum, 60% between \$2,000 and \$4,800 and only 10% over \$4,800.

The school was built in 1929 (average Group X date is 1912); it is larger and roomier than the average Group X school. There are 62.3 square feet of floor space per child (Group X average, 59 square feet), 218.0 square feet of site (Group X, average 46.3 square feet), 21.4 square feet of ground floor space (Group X average 17.4 square feet), and 14.9 square feet of outdoor playground (Group X average 2.2 square feet). The building has not been renovated since 1943 (Group X average 1937.8) but renovation is to be accomplished this year.

The school is relatively small with an enrollment of 560 children and a capacity of 648. Its utilization index is 87 (Group X average 108.9). The average class size (excluding one CRMD class of 13 children) is 35.3 (Group X average 35.1).

The principal considers most of the facilities adequate. Even though the school has no gymnasium or lunchroom, the basement has satisfactorily served the functions performed by these. There is no central library.

The financial outlay per child is not consistently higher than the average for Group X schools. Operational costs, however, were \$31.4 (Group X average \$19.2) per child.

Educational achievement measured by traditional standards are high: third grade children have a reading test score of 3.25, and the sixth grade scores 5.8 (Group X averages are 2.5 and 4.7 respectively). In arithmetic the sixth grade scores 5.5 (Group X average 4.8).

Although conclusions from one case are not very reliable, this school demonstrates what can be done. It might also be suggestive of the relationship that exists between facilities and achievement.

Need for high school study

This report does not cover the high schools, for staff limitations, money and time did not permit. Outside agencies have given the committee information which suggests that such a study be undertaken by the Commission on Integration of the Board of Education.

3. Zoning Practices

The controversy

In addition to the questions concerned with equality of education for Negroes and Puerto Ricans, there have been questions raised about the

zoning practices of the Board of Education. Is there segregation? Do the zoning practices favor separation of Negro and Puerto Rican groups in the schools? This section proposes answers to these questions.

The question of segregation

Of the city's 639 elementary schools, 445 or 71% enroll 90% or more Negro and Puerto Rican children or 90% or more children of other ethnic origins. This is a state of affairs which we all should deplore although it cannot be placed at the doorstep of the Board of Education. Many conditions conspire to promote such a separation of children in schools but in the strictly legal sense of the word there is no such thing as segregation in the school system of New York City. Segregation in legal terminology implies legislative discrimination against a minority group. There is nothing in the law or in the rules and stated policies of the Board of Education of New York City to indicate that there is segregation of children into separate schools.

The question of school district boundaries

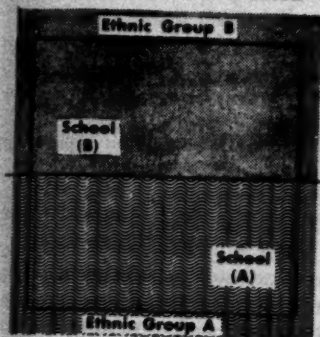
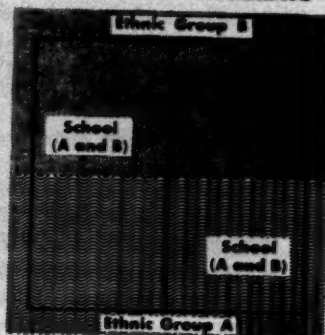
We have already noted that New York City schools are neighborhood schools and that the school population, therefore, reflects the ethnic composition of the school district. As long as the principle of neighborhood schools persists, in the central areas of homogeneous ethnic communities it is immaterial, from the point of composition of the school, where school district boundary lines are drawn. A school in the center of Harlem will be a Negro school.




On the other hand, in fringe areas where groups of different ethnic composition meet geographically, the individual responsible for zoning school districts is faced with these three alternatives:

1. He may select boundaries which promote ethnic separation.
2. He may ignore the ethnic composition problem.
3. He may select boundaries which encourage integration of ethnic groups. (See Figure 1.)

A device that may be used to foster ethnic separation through zoning, although it also has other more legitimate purposes, is the creation of what is known as a "permissive area" within the school district. A permissive area is a "no-man's land," residents within which are permitted a choice of schools for their children. (Usually the choice they will make is obvious because of ethnic group.) Children in a permissive area, if they are all of one ethnic extraction, are placed in a position where they can choose a school of that extraction and thus avoid going to a nearer school of different ethnic composition. Figure 2 on the following page demonstrates how the permissive area may be employed to further the process of segregation through zoning. What often makes the use of a permissive area questionable is that it can be designed to conceal the facts of ethnic separation by a deceit of zoning.

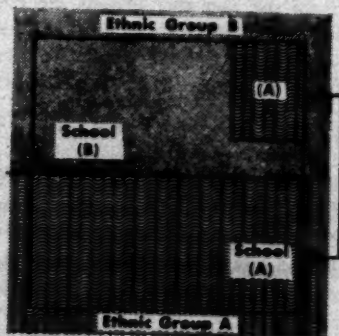
Figure 1

*Types of Fringe Area Zoning***ZONING TO SEGREGATE****ZONING TO INTEGRATE**

-  Ethnic Group A
-  Ethnic Group B
-  Boundary of School Districts

Note: (A) and (B) are the same geographical areas.

Figure 2

Use of Permissive Area to Foster Ethnic Segregation in Schools

The report endeavors to answer the following questions about the zoning practices in the New York City schools:

1. Are the schools being zoned in ways which further ethnic separation?
2. Are the schools being zoned in ways which ignore both the possibility of separation and integration?
3. Are the schools being zoned in ways which favor integration?

QUESTION

1. Are schools being zoned in ways which further ethnic separation?

ANSWER

1. *There is no significant evidence to indicate that ethnic separation is seriously considered in drawing school district boundary lines.*

1.1—There is considerable evidence which indicates that some parents will falsify addresses, employ political pressure, and deliberately confuse zoning issues in an effort to avoid sending their children to schools which are predominantly Negro and Puerto Rican.

1.2—The inquiry found no evidence which would indicate that school officials were creating permissive zones to separate children by ethnic groups. On the contrary, the researchers worked with one assistant superintendent who was in the process of eliminating such a permissive zone which did tend to separate Negroes and Puerto Ricans from children of other ethnic origins. The assistant superintendent called upon the parents to assist her and, contrary to what is commonly believed, parents from all the ethnic groups involved joined together to find a just and acceptable solution to the difficulties created by the existence of the permissive area.

Observations and recommendations

Many of the charges that the school system is separating children by ethnic groups arise from the fact that parents are circumventing school regulations. Every effort should be made to insist that children who belong in a given school go to that school. The permissive zone when established in fringe areas is always suspect. The creation of such zones should be avoided.

QUESTION

2. Are schools being zoned in ways which ignore both the possibility of separation and integration?

ANSWER

2. *In general the principles followed in zoning school districts ignore both the possibility of separation and integration of ethnic groups.*

In New York City the assistant superintendent of an administrative district zones the schools in that district. Interviews with assistant super-

intendents revealed that the following principles guide their zoning practices:

1. Schools are zoned so that the distances a child must walk are kept to a minimum. Transportation of children at school expense is avoided if possible.
2. Major traffic hazards are avoided, and topographical features, such as the steep hill at Morningside Heights, are considered.
3. School population size is balanced according to building capacities.
4. Changes in district boundaries are kept to a minimum.

The study does not in any way desire to minimize the difficulties encountered in zoning. It is not easy to balance zoning principles against each other, to consider dozens of other variables, and at the same time keep the public happy in the process of drawing school district lines. To suggest that these lines be drawn to consider the possibility for integration is to make more difficult that which is already too difficult. Yet as things stand, because of residential separation by ethnic groups, the principle of proximity to the school in school districting has resulted in a situation where in only 30% of the schools do appreciable numbers of Negro and Puerto Rican children contact continental white children.

Observations and recommendations

The surveyors are confident in their belief that the source of many of the charges of separation by ethnic groups leveled against school officials lies in the fact that information relative to school district lines is almost inaccessible. The central office should possess a map of school districts which is kept up to date and available to anyone who might wish to see it. Whenever matters of public interest are concealed, the public agency responsible is suspect. Since there is no possible reason for concealing school district information, it should be made public knowledge.

QUESTION

3. Are the schools being zoned in ways which favor integration?

ANSWER

3. *It is not overall school policy to encourage integration through zoning.*

As a matter of fact it is an issue which only social philosophy can answer whether the schools are morally bound to zone in ways to integrate ethnic groups or whether ethnic compositions should be ignored in the process of setting up school districts. Some superintendents argued with considerable justification that in order to integrate ethnic groups it is first necessary to identify them. They were reluctant to ask children questions about race and religion because the very asking of such questions is per se an act of segregation.

The reply to this argument is to point out that one of the major responsibilities of the schools is to teach intercultural and interracial understanding. What better way is there to accomplish this end than to provide an opportunity for children of various ethnic origins to live and work together in the schools?

Observations and recommendations

It is beyond the responsibility of this report to recommend a public policy with respect to integration of Negro and Puerto Rican children into the public schools of New York City. This is a matter for consideration by the Board of Education's Commission and for Board of Education policy decision. It suggests, however, that whenever a superintendent can further integration by drawing district lines he should so do. (See Figure 1.)

If two adjacent schools contain varying percents of Negro and Puerto Rican children, it may be possible under certain conditions to change district lines to equalize these percents. There are 258 pairs of elementary and junior high schools within the same districts which differ in the percent of Group Y children enrolled by 30% or more. These might well be studied by the Commission on Integration to see if redistricting is possible and if such redistricting would lead to better integration of these children. The Research Center made a number of studies of fringe area districts to see how this could be accomplished and its experience is available to the Board of Education should it desire it.

4. The Data

TABLE 1

Composition of the Population of Elementary and Junior High Schools in New York City at the Time of This Report

Percent of Negro and Puerto Rican Students	GRADE					Percent of Total
	K _R -6	K _R -8	K _R -9	7-9	Total	
91-100%	33	3	3	5	44	6.9
81-90	19	0	1	4	24	3.8
71-80	10	0	1	5	16	2.5
61-70	13	2	1	3	19	3.0
51-60	15	3	1	4	23	3.6
41-50	13	3	2	7	25	3.9
31-40	14	4	1	0	19	3.0
21-30	14	6	2	5	27	4.2
11-20	18	7	1	8	34	5.3
1-10	184	78	11	23	296	46.3
0	63	38	5	6	112	17.5
Total	396	114	29	70	639	100.0

TABLE 2
Types of Schools Studied
GROUP Y SCHOOLS
 Other Ethnic Groups
 Elementary Schools

Borough	District	
Bronx	19	P.S. 88
	21	P.S. 33, 57, 91
	22	P.S. 24
	23	P.S. 102, 105
Brooklyn	28	P.S. 131
	30	P.S. 34
	36	P.S. 105, 127, 160
	37	P.S. 112, 164, 204
	38	P.S. 177, 180, 186, 192, 200
	39	P.S. 212, 248
	41	P.S. 208, 221, 235, 244, 268
	44	P.S. 76, 224
Queens	45	P.S. 148
	46	P.S. 70, 80,* 84, 112, 166, 199
	47	P.S. 78, 139, 153, 175
	49	P.S. 3, 51, 53, 66, 100, 101, 114, 144, 196, 215
	50	P.S. 55, 57, 96, 161, 176
	51	P.S. 99, 186
	52	P.S. 31, 177, 188

Junior High Schools

Borough	District	
Brooklyn	36	J.H.S. 220, 259
	37	J.H.S. 223, 227
	38	J.H.S. 96
	39	J.H.S. 228
	40	J.H.S. 234, 240
	41	J.H.S. 285*
Queens	45	J.H.S. 145
	46	J.H.S. 10, 125
	47	J.H.S. 190*
	49	J.H.S. 198*
	52	J.H.S. 216*

GROUP X SCHOOLS
Negro and Puerto Rican
 Elementary Schools

Borough	District	
Manhattan	9	P.S. 72, 107, 109
	10	P.S. 57, 102, 103, 108
	11	P.S. 10, 113, 157, 170, 184
	12	P.S. 24, 68, 89, 119, 133
	13	P.S. 5, 46, 90, 156,* 186, 194
Bronx	16	P.S. 124
	17	P.S. 23, 99
	19	P.S. 63
Brooklyn	26	P.S. 47, 78
	27	P.S. 41, 44
	32	P.S. 26, 28, 70, 83, 129
Queens	48	P.S. 92, 143
	50	P.S. 48, 116, 140, 160

Junior High Schools

Borough	District	
Manhattan	10	J.H.S. 120
	11	J.H.S. 81
	12	J.H.S. 139
	13	J.H.S. 136, 164
Bronx	16	J.H.S. 51
	17	J.H.S. 40
	19	J.H.S. 55
Brooklyn	42	J.H.S. 66

* J.H.S. 285 Brooklyn, 190, 198 and 216 Queens and P.S. 156 Manhattan, are new schools and data were not always available concerning them. P.S. 80 Queens is now an annex to P.S. 199.

Number of Schools Studied

Total Group Y (Other ethnic groups) Schools—60 elementary, 15 junior high.

Total Group X (Negro and Puerto Rican) Schools—42 elementary, 9 junior high.

TABLE 3
Construction Date of School Buildings

Construction Date	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
Before 1900	5%	32%	0%	0%
1900-1919	23%	29%	0%	56%
1920-1939	48%	22%	60%	33%
1940 or later	24%	17%	40%	11%
Mean date	1924	1912	1940	1920

TABLE 4*Space Available per Pupil*

	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
Surface Space				
Floor space	88.9 sq. ft.	59.0 sq. ft.	75.4 sq. ft.	78.0 sq. ft.
Site space	103.1 sq. ft.	46.2 sq. ft.	62.4 sq. ft.	42.2 sq. ft.
Ground level space	26.9 sq. ft.	17.4 sq. ft.	24.3 sq. ft.	18.5 sq. ft.
Playground space	3.8 sq. ft.	2.2 sq. ft.	2.1 sq. ft.	1.3 sq. ft.

TABLE 5*Per Cent of Schools Having Particular Facilities and Special Rooms*

Facility	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
Auditorium	83%	78%	100%	100%
Assembly room	68%	18%	—	—
Shower room(s)	48%	30%	77%	55%
Gymnasium	61%	68%	100%	89%
Correctional gymnasium	7%	0%	—	—
Roof playground	15%	15%	8%	11%
Library	68%	71%	100%	100%
Science room(s)	51%	36%	100%	100%
Domestic Science room(s)	—	—	100%	67%
Drawing room	—	—	100%	89%
Sewing room	—	—	92%	77%
Commercial room(s)	—	—	100%	100%
Dressmaking room(s)	—	—	38%	0%
Industrial room(s)	—	—	100%	100%

TABLE 6*Percentage of Principals Rating Various Facilities "Adequate"*

Facility	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
Auditorium space	84.0%	63.1%	71.4%	88.9%
Classroom space	76.8%	38.4%	33.3%	11.1%
Classroom storage space	31.0%	27.5%	53.3%	11.1%
Classroom clothes closets	81.8%	47.5%	73.3%	55.6%
General storage space	47.4%	26.8%	60.0%	25.0%
Gymnasium space	72.0%	35.1%	48.9%	33.3%
Gymnasium equipment	78.9%	55.2%	69.2%	25.0%
Kitchen facilities	66.0%	28.2%	73.4%	33.3%
Library space	60.0%	52.7%	78.6%	100.0%
Library books	58.7%	46.0%	71.5%	66.7%
Library equipment	49.1%	38.2%	64.3%	66.7%

Lunchroom space	42.6%	20.0%	40.0%	11.1%
Office space	79.3%	57.9%	60.0%	44.5%
Office equipment	69.1%	52.6%	66.7%	33.3%
Teachers' room	58.9%	31.7%	57.1%	12.5%
Pupils' toilet	83.0%	54.0%	87.0%	89.0%
Teachers' toilet	81.0%	59.0%	73.0%	56.0%

TABLE 7*Principals' Average Satisfaction With Facilities*

Degree of Satisfaction	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
Facilities adequate	64%	41%	61%	41%
More facilities needed	20%	22%	23%	32%
Many more facilities needed	16%	31%	16%	27%

TABLE 8*Principals' Satisfaction With Teaching Equipment*

Degree of Satisfaction	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
Satisfied	54%	37%	66%	33%
Satisfied, with qualification	22%	20%	7%	11%
Not satisfied, with qualification	—	7%	—	—
Not satisfied	24%	36%	27%	56%

TABLE 9*Per Cent of Teachers on Tenure*

Percent on Tenure Per School	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
Less than 50%	3.4%	53.7%	13.5%	55.5%
51%-80%	45.8%	41.4%	80.0%	44.5%
More than 80%	50.8%	4.9%	6.7%	0.0%

TABLE 10*Average Composition of Faculty*

Status of Teachers	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
On tenure	78.2%	50.3%	62.0%	47.1%
On probation	13.5%	31.6%	13.1%	15.8%
Permanent substitutes	8.3%	18.1%	24.9%	37.1%

TABLE 11
Teacher Turnover
Elementary Schools

	Group Y		Group X	
	Last year	Current	Last year	Current
On tenure	80.3%	78.2%	57.1%	50.3%
On probation	11.0%	13.5%	27.3%	31.6%
Permanent substitutes	8.7%	8.3%	15.6%	18.1%
N (# of all teachers = 100%)	(1808)	(1687)	(2080)	(2099)

Junior High Schools

	Group Y		Group X	
	Last year	Current	Last year	Current
On tenure	70.0%	62.0%	54.3%	47.1%
On probation	8.6%	13.1%	14.2%	15.8%
Permanent substitutes	21.4%	24.9%	31.5%	37.1%
N (# of all teachers = 100%)	(979)	(1048)	(661)	(656)

TABLE 12
Special Services Granted Schools
Per Cent of Schools Having Service

Nature of Service	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
Social worker	40%	50%	23%	66%
Psychologist	67%	95%	71%	63%
Youth Board service	2%	42%	0%	67%

TABLE 13
IGC and CRMD Classes
Percent of Schools Having Special Classes

Type of Class	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
IGC classes	3.6%	2.4%	66.7%	0.0%
CRMD classes	17.0%	87.8%	60.0%	100.0%

TABLE 14
Average Number and Size of Special Classes

	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
Average number of special classes	2.1	6.2	7.8	15.0
Average size of special classes	22.1	18.7	24.8	23.5

TABLE 15*Maintenance Cost Per Child 1953-1954 (In dollars)*

	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
Repairs and Replacement to:				
Buildings and structural equipment	6.5	4.6	3.5	4.6
Furniture and instructional equipment	1.8	.7	1.6	.9
	<hr/>	<hr/>	<hr/>	<hr/>
Total	8.3	5.3	5.1	5.5

TABLE 16*Operation of School Plant Cost Per Pupil 1953-1954 (In dollars)*

	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
Compensation of custodians, elevator operators, et al	22.9	15.7	20.0	22.5
Fuel, water, supplies and other expenses of operation	4.6	3.5	4.2	5.5
	<hr/>	<hr/>	<hr/>	<hr/>
Total	27.5	19.2	24.2	28.0

TABLE 17*Average Number of Pupils Per Administrator*

	Elementary Schools		Junior High Schools	
	Group Y	Group X	Group Y	Group X
Pupils per administrator	606.7	543.6	498.3	430.9

TABLE 18*Average Reading Test Scores*

Grade and Test	Group Y Norms		Group X Norms	
3rd grade-Metropolitan Achievement (Primary)		3.7		2.5
6th grade-Metropolitan Achievement (Intermediate)		6.9		4.7
8th grade-Metropolitan Achievement (Advanced)		8.4		6.0

TABLE 19*Average Arithmetic Test Scores*

Grade and Test	Group Y Norms		Group X Norms	
6th grade-Metropolitan Achievement (Intermediate)		6.4		4.8
8th grade-New York Arithmetic Computation (C)		8.7		6.0

Judgment of the District Court
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 2419-71

NEW YORK STATE, on behalf of New York, Bronx
 and Kings Counties,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant,

N.A.A.C.P., NEW YORK CITY REGION OF NEW YORK STATE
 CONFERENCE OF BRANCHES, *et al.*,
Applicants for Intervention.

Before TAMM, Circuit Judge, JONES and GREEN, District
 Judges.*

ORDER

The Motion of N.A.A.C.P., New York City Region of
 New York State Conference of Branches, *et al.*, to Alter
 the Judgment of the Court in this action, entered April 12,
 1972, denying their Motion to Intervene as party defen-
 dants and granting plaintiff New York State's Motion for
 Summary Judgment, having come before the Court at this
 time; and having considered the memoranda, affidavits

* GREEN, District Judge, did not participate in this decision.

Judgment of the District Court

and exhibits submitted in support of the Motion to Alter Judgment, the Court enters the following Order pursuant to Local Rule 9(f), as amended January 1, 1972.

Wherefore, it is this 25th day of April, 1972.

ORDERED: That the Motion of N.A.A.C.P., et al., to Alter the Judgment of the Court in this action be and the same is hereby denied.

/s/ EDWARD ALLEN TAMM
Circuit Judge

/s/ WILLIAM B. JONES
District Judge

Notice of Appeal

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civil Action No. 2419-71

**NEW YORK STATE, on behalf of New York, Bronx,
and Kings Counties,**

Plaintiff,

—against—

UNITED STATES OF AMERICA,

Defendant,

N.A.A.C.P., etc., et al.,

Applicants for Intervention.

NOTICE OF APPEAL

TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the N.A.A.C.P., New York City Region of New York State Conference of Branches, Antonia Vega, Simon Levine, Samuel Wright, Waldaba Stewart and Thomas R. Fortune, applicants for intervention in the above mentioned action, hereby appeal to the Supreme Court of the United States from the final order entered in this action on April 13, 1972, denying applicants' application for intervention and granting a declaratory judgment in favor of the plaintiff and the final order entered in this action on April 25, 1972, denying applicants' motion to alter judgment.

This appeal is taken pursuant to 42 U.S.C. §1973b(a).

Notice of Appeal

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Counsel for Appellants

**Order of the Supreme Court Postponing
Jurisdiction, Entered November 6, 1972**

SUPREME COURT OF THE UNITED STATES

**OFFICE OF THE CLERK
WASHINGTON, D. C. 20543**

November 6, 1972

Jack Greenberg, Esq.
10 Columbus Circle, Suite '2030
New York, N. Y. 10019

**Re: *National Association for Advancement
of Colored People v. New York*
No. 72-129**

Dear Mr. Greenberg:

Confirming our telegram of today, the Court took the following action in the above case:

"In this case probable jurisdiction is postponed to the hearing of the case on the merits. Mr. Justice Marshall took no part in the consideration or decision of this matter."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of \$50, Rule 52(a) is due and payable.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ HELEN K. LOUGHRAN
(Mrs. Helen K. Loughran
Assistant Clerk

Enclosures

129

IN THE
Supreme Court of the United States

October Term, 1972

No. ----- **72-129**

U. S.
FILED

JUL 21 1972

MICHAEL RODAK, JR., CLERK

**NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE, NEW YORK CITY REGION OF NEW YORK
CONFERENCE OF BRANCHES, et al.,**

Appellants,

v.

**NEW YORK, on behalf of New York, Bronx, and
Kings Counties,**

Appellees.

**NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE, NEW YORK CITY REGION OF NEW YORK
CONFERENCE OF BRANCHES, et al.,**

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JURISDICTIONAL STATEMENT

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Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Appellants¹ appeal from the judgment of the United States District Court for the District of Columbia, entered

¹The appellants, applicants for intervention in the District Court, are the New York City Region of New York Conference of Branches of the National Association for the Advancement of Colored People, Simon Levine, Antonia Vega, Samuel Wright, Waldaba Stewart and Thomas Fortune.

on April 13, 1972, denying appellants' motion to intervene, and from the order of that court, entered on April 25, 1972, denying appellants' motion to alter judgment. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The District Court for the District of Columbia issued no opinion in connection with this case. The judgment of the District Court, entered April 13, 1965, denying appellants' motion to intervene, and the order of the District Court, entered April 25, 1972, denying appellants' motion to alter judgment, are set out in Appendix A hereto.

Jurisdiction

This suit was brought by the State of New York, under 42 U.S.C. §1973b, to obtain for three counties of that state an exemption from certain provisions of the Voting Rights Act of 1970. The matter was heard before a three-judge panel pursuant to 42 U.S.C. §1973b and 28 U.S.C. §2284. Shortly after the United States declined to oppose the granting of such an exemption, appellants moved to intervene as party defendants. The judgment of the District Court denying that motion and granting the exemption was entered on April 13, 1972, and the order of the District Court denying appellants' motion to alter judgment was entered on April 25, 1972. The notice of appeal was filed in that court on May 11, 1972. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 42, United States Code, section 1973b(a). The jurisdiction of the Supreme Court to review

the judgment on direct appeal in this case is sustained in *Gaston County v. United States*, 395 U.S. 285 (1969).

Statutes Involved

Section 1973b, 42 United States Code, provides

§1973b. Suspension of the use of tests or devices in determining eligibility to vote—Action by state or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under

this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

Required factual determinations necessary to allow compliance with tests and devices; publication in Federal Register

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addi-

tion to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

Definition of test or device

(c) The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any education achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher or registered voters or members of any other class.

Section 1973c, 42 United States Code, provides

§1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of

voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objec-

tion within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

The Question Presented

Where the State of New York sues for an exemption from sections 4 and 5 of the Voting Rights Act of 1965, as amended, and the United States expressly and without justification declines to defend the action, should intervention be granted to a civil rights group and individuals who have initiated other litigation to compel compliance with sections 4 and 5 and who offer specific allegations and substantial documentary evidence in opposition to the granting of such an exemption.

Statement of the Case

Under the 1970 amendments to the Voting Rights Act of 1965, three counties in the state of New York—Bronx, Kings (Brooklyn) and New York (Manhattan)—are subject to coverage by sections 4 and 5 of the Act. Those sections are applicable because on November 1, 1968, New York State employed a literacy test as a prerequisite to registration and less than 50 percent of the persons of voting age were registered on that date or voted in the 1968 presidential election in each of those three counties. 42 U.S.C. § 1973b(b). Section 5 provides that no changes in the election laws or practices of such covered areas may

be enforced until the state or subdivision involved has either submitted those changes to the Attorney General without his objecting to them for a period of 60 days, or has obtained a declaratory judgment from the United States District Court for the District of Columbia that the changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973c(a). Section 4 also provides that a state or subdivision subject to this advance clearance procedure may obtain an exemption therefrom by bringing an action for a declaratory judgment against the United States and obtaining from the United States District Court for the District of Columbia a determination that the literacy test employed by the state or subdivision has not been used during the 10 years preceding the filing of that action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973b(a).

The 1970 amendments to the Voting Rights Act of 1965, which for the first time subjected the three counties to these special procedures, became law on June 22, 1970. Although it was known at that time that the counties would be covered, that coverage did not go into effect until March 27, 1971, following the formal publication of certain determinations by the Director of the Bureau of the Census. See 36 Fed. Reg. 5809. On December 16, 1971, the state of New York brought this action in the United States District Court for the District of Columbia to secure an exemption for New York, Bronx and Kings counties. The United States answered on March 10, 1972. On March 17, 1972, New York moved for summary judgment.

During the pendency of this matter, but prior to any action therein by the District Court, the State of New

York enacted legislation altering the boundaries of the congressional, Assembly, and State Senate districts in the three counties. The statute altering the Assembly and Senate districts was enacted on January 14, 1972, and on January 24, 1972 these changes were submitted to the Attorney General by the state of New York. On March 14, 1972, the Attorney General rejected the submission on the ground that it lacked information required by the applicable regulations. 36 Fed. Reg. 18186-190. The changes in the congressional districts, enacted on March 28, 1972, were never submitted to the Attorney General. Immediately upon the passages of these two redistricting laws and despite the absence of compliance with sections 4 and 5, officials in all three counties took steps to implement the changes, including redistribution of voter registration cards among the new districts and printing and distributing nomination petitions.

On March 21, 1972, counsel for appellants informed the Department of Justice by telephone that appellants intended to bring an action to enjoin enforcement of the new district lines until section 5 had been complied with, and indicated that appellants would urge the Attorney General to object to the new district lines when they were submitted to him on the ground, *inter alia*, that the lines had been drawn in such a way as to minimize the voting strength of blacks, Puerto Ricans, and other minorities. Such an action was filed by appellants 17 days thereafter in the Southern District of New York, *National Association for the Advancement of Colored People v. New York City Board of Elections*, 72 Civ. 1460. Counsel for appellants also advised the Department attorneys that the New York Advisory Committee to the United States Civil Rights Commission intended to hold hearings in April, 1972 regarding the new district lines in the three counties to assist the

Commission in deciding whether to urge the Attorney General to object to those changes in New York law. During the same discussion with the Department of Justice, counsel for appellants learned for the first time of the pendency of the instant action and of New York's motion for summary judgment. On three separate occasions, March 21, March 29, and April 3, 1972, counsel for appellant was expressly assured by Justice Department attorneys that the United States would oppose any exemption for the three counties and was preparing papers in opposition to the motion for summary judgment. At no time did any representative of the Department, though fully aware of appellants interest in this action, seek from appellants or their counsel, or indicate any interest in, information regarding the central issue in the instant case—whether New York's literacy tests had been used in the three counties over the previous decade with the purpose or effect of denying or abridging the right to vote on account of race or color.

On April 3, 1972, the Assistant Attorney General in charge of the Civil Rights Division executed a 4 page affidavit on behalf of the Attorney General stating that the United States had no reason to believe that literacy tests had been used in New York, Kings or Bronx counties in the previous 10 years with the purpose or effect of denying or abridging the right to vote on account of race or color. The affidavit was filed with the District Court for the District of Columbia the next day, together with a one sentence memorandum consenting to the entry of the declaratory judgment sought by New York. (The Affidavit and Memorandum are set out in Appendix B.) On the afternoon of April 5, 1972, counsel for appellants was notified by telephone of the Justice Department's reversal of its earlier position. Appellants moved to intervene as party defendants in the instant proceeding on April 7, 1972.

Appellants' motion to intervene was opposed by New York; the United States has filed no further papers in the case. On April 13, 1972, the District Court denied without opinion appellant's motion to intervene and entered judgment in favor of plaintiff. On April 24, 1972, appellants moved the District Court to alter its judgment. That motion was denied without opinion on April 25, 1972.² This appeal followed.³

The Question Presented is Substantial

The instant action arises from an attempt by the state of New York to nullify one of the most important of the 1970 amendments to the 1965 Voting Rights Act. The amendment in question proposed on the Senate Floor by Senator Cooper, altered the formula in sections 4 and 5 of the Act with the express purpose of extending their coverage to more than 2 million blacks and Puerto Ricans in New York, Bronx and Kings counties. The United States systematically declined to investigate or present to the court below any of the factual or legal theories which had prompted Congress to extend coverage to these three counties and which had earlier been advanced by the United States before congressional committees and this Court. The Voting Rights Act does not authorize the Attorney General to grant exemptions to sections 4 and 5, but required the court below to make its own independent determination that the three counties had not used literacy tests with the proscribed purpose or effect. In the face of the

² The order denying this motion was signed by only 2 members of the three judge panel. Judge Greene, for unexplained reasons, did not participate.

³ By agreement of counsel no further action has been taken by either party in the New York action pending a final decision in the instant case.

refusal of the United States to offer to the court relevant evidence or arguments in this regard, the district court should have permitted appellants to intervene and assist it by presenting such material.

1. The Cooper Amendment was expressly intended to place three New York counties under sections 4 and 5 of the Voting Rights Act.

Under the 1965 Voting Rights Act as originally enacted the requirements of sections 4 and 5 regarding federal clearance of new voting laws and practices were applied to any state or subdivision which met two criteria: (1) on November 1, 1964, it had in effect a test or device as defined in section 4(c), 42 U.S.C. §1973b(c), such as a literacy test, and (2) less than 50 percent of the voting age population was registered on November 1, 1964, or less than 50 percent of such persons voted in the 1964 presidential election. Most of the covered areas were located in the south; Alabama, Louisiana, Mississippi, Georgia, South Carolina, Virginia, and 40 counties of North Carolina were subjected to the clearance procedures. In the north 6 scattered counties and the state of Alaska were also covered. Between the enactment of the 1965 Act and the 1970 amendments only one county in the South was able to obtain an exemption; in the north, however, Alaska and at least 4 of the affected counties obtained, with the concurrence of the Attorney General, declaratory judgments exempting them from sections 4 and 5. See 116 Cong. Rec. 5526, 6521, 6621, 6654 (1970).

Sections 4 and 5 of the 1965 Act were so framed as to automatically expire in 1970. Extension of these provisions was proposed for a period of 5 years until 1975, but both the Administration and many members of Congress opposed any such extension. The principal criticism voiced by

these opponents and recurring throughout the history of the 1970 amendments was that sections 4 and 5 applied almost exclusively to the South, and constituted discriminatory regional legislation. Renewal of the sections was initially rejected by the House on this ground.⁴ When the measure was considered by the Senate, the same argument was advanced.⁵ Critics of sections 4 and 5 reiterated that discrimination was a national problem and could be found even in the city of New York.⁶ In particular it was repeatedly pointed out that New York, Kings and Bronx Counties, which did not fall under the 1965 Act, would have been covered by sections 4 and 5 of the Act if the formula contained therein had referred to registration and voting turnout in November 1968 instead of November 1964.⁷

In response to these arguments Senator Cook proposed that sections 4 and 5 be altered so as to cover states and subdivisions which had the specified tests or devices and low registration or presidential vote in *either* 1964 or 1968. Senator Cooper explained his amendment in the following terms:

The pending amendment would bring under coverage of the Voting Rights Act of 1965, and under the triggering device described in section 4(b), those States or political subdivisions which the Attorney General may determine as of November 1, 1968, employed a test or

⁴ 113 Cong. Rec. 38485-38537 (1969).

⁵ See generally 114 Cong. Rec. 5516-6661 (1970).

⁶ 114 Cong. Rec. 5534 (Remarks of Senator Hansen), 5670 (Remarks of Senator Byrd), 5687-8 (Remarks of Senator Long), 6158 (Remarks of Senator Gurney), 6161-63 (Remarks of Senator Ellender) (1970), 6621-22 (Remarks of Senator Long).

⁷ 114 Cong. Rec. 5546 (Remarks of Senator Ervin), 6151-52 (Remarks of Senator Ellender), 6623-25 (Remarks of Senator Allan) (1970).

device and where less than 50 percent of persons of voting age were registered or less than 50 percent of such persons voted in the presidential election of 1968.

• • •

One of its purposes is to establish the principle that the Voting Rights Act of 1965 and, in particular, its formula, section 4(b), which is called the trigger, is applicable to all States and political subdivisions and is not restricted to the Southern States.

• • •

The amendment also establishes the principle which has been approved in our debate—that legislation to secure the voting rights must apply to all the people of this country, and to all the States. It is not restricted to a fixed date in the past, whether 1964 or 1968. It is a continuing effort to secure and assure voting rights to all the people of our country.

• • •

The chief State involved is the State of . . . New York. Three counties of New York were involved, Bronx, Kings, and New York. In the 1964 election more than 50 percent of the voters were registered and more than 50 percent voted. However, for some reason in the 1968 election 50 percent were not registered or voting. 114 Cong. Rec. 6654, 6659 (1970).

Although opposed by the Senators from New York, the Cooper amendment was passed with the support of Senators from all regions of the country. 114 Cong. Rec. 6661. When the Senate bill was brought up for consideration, both the Chairman of the Judiciary Committee and the Majority Leader noted that the new version applied to New York, Kings and Bronx Counties, the latter noting that this

change demonstrated that the Act was not "aimed at any one section."⁸ The House, which had earlier rejected renewal of sections 4 and 5, acquiesced in their reenactment as thus modified.⁹

The Senate debates leading to the passage of the Cooper amendment reveal a variety of concerns as to the manner in which New York's literacy test had had a discriminatory purpose or effect in the three counties involved. (1) Senator Cooper, referring to this Court's decision in *Katzenbach v. Morgan*, 384 U.S. 641, 654 n.14 (1966), urged that New York's 1922 literacy requirement was enacted, with the purpose of discriminating on the basis of race.¹⁰ (2) Senator Griffin argued that if New York denied the vote to illiterate black applicants who had received an inferior education in a segregated southern school system, the literacy test would have the effect of discrimination on the basis of race in a manner which this Court had earlier held to constitute the type of discrimination which precludes an exemption from sections 4 and 5.¹¹ (3) Senator Hruska, quoting testimony by the Attorney General, suggested it would also discriminate on the basis of race to deny the franchise to illiterates who had received an inferior education in the north, without regard to whether a de jure dual school system might be involved.¹² (4) Again quoting the Attorney General, Senator Hruska suggested that the mere use of

⁸ 114 Cong. Rec. 20161 (Remarks of Rep. Celler), 20165 (Remarks of Rep. Albert) (1970).

⁹ 114 Cong. Rec. 20199 (1970).

¹⁰ 114 Cong. Rec. 6660 (1970); see also 114 Cong. Rec. 6659 (Remarks of Senator Murphy).

¹¹ 114 Cong. Rec. 6661; see also 114 Cong. Rec. 5533 (Remarks of Senator Hruska), 6158-9 (Remarks of Senators Dole and Mitchell) (1970); *Gaston County v. United States*, 395 U.S. 285 (1969).

¹² 114 Cong. Rec. 5533 (1970).

literacy tests had a psychological effect which tended to deter blacks who might seek to register and thus have a racially discriminatory effect.¹³ (5) Several Senators suggested that literacy tests were discriminatory in effect merely because the rate of illiteracy was higher among blacks or other minorities than among whites.¹⁴

The Cooper amendment expanded substantially the number of persons protected by sections 4 and 5. The three New York counties concerned have a total black population of 1.4 million and another 800,000 Puerto Ricans.¹⁵ The combined minority population of these counties is almost double that of the largest southern state covered by the Act; Kings County alone has nearly as many black residents as do the states of Virginia and South Carolina. All the exemptions granted by the federal courts prior to the instant case affected a total of no more than 100,000 minority group members. By granting an exemption to New York, Kings and Bronx counties, the court below not only nullified the Cooper amendment, but withdrew the protection of sections 4 and 5 from an area of unprecedented size.

2. The United States improperly declined to oppose exempting the three New York counties from sections 4 and 5.

The affidavit submitted by the United States below, and set out in Appendix B, acquiescing to the exemption for the three counties reveals an incomprehensible failure by the Justice Department to pursue the legal and factual concerns which led to the passage of the Cooper amendment. The investigation conducted by the Department "con-

¹³ 114 Cong. Rec. 5533; see also 114 Cong. Rec. 6152 (Remarks of Senator Eastland) (1970).

¹⁴ 114 Cong. Rec. 5532-3 (Remarks of Senator Hruska), 6152 (Remarks of Senator Eastland), 6156 (Remarks of Senator Gurney) (1970).

¹⁵ Unpublished figures supplied by the Bureau of the Census.

sisted of examination of registration records in selected precincts in each covered county, interviews of certain election and registration officials and interviews of persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties." (Appendix, p. 8a) So far as appears from the government's papers, its investigators may never have interviewed any person not interested in obtaining the exemption or even any black or Puerto Rican. None of the appellants or their counsel, all of them known to be vitally interested in this case, were ever interviewed or even informed by the Justice Department that any investigation was underway. An examination of the registration records was well calculated to reveal nothing other than clumsily concealed discrimination in the application of the literacy tests, and the legislative history of the Cooper amendment reveals that that was one of the few types of discrimination Congress did *not* consider. The results of this investigation were predictably barren. Beside detailing the extent to which election officials had failed at first to comply with the 1965 federal ban on English language literacy tests to deny the vote to Puerto Ricans with at least a sixth grade education, and with the 1970 federal prohibition against all literacy tests, the affidavit lamely recites that the interviews with election officials and other unnamed knowledgeable persons "revealed no allegation by black citizens that the previously enforced literacy test was used to deny or abridge their right to register and vote by reason of race or color." (Appendix, p. 9a)

The most striking aspect of the government's affidavit and one page affidavit are the omissions. No inquiry was made as to whether New York's literacy tests were discriminatory because blacks or Puerto Ricans in the three counties had a higher rate of illiteracy than whites due to unequal educational opportunities in the three counties, an

approach which the United States had pressed with vigor three years before in *Gaston County v. United States*, 395 U.S. 285 (1969), and which the Attorney General had urged before Congress.¹⁶ No inquiry was made as to whether the tests discriminated against blacks who had received an inferior segregated education in the south and then moved to New York, a species of discrimination which the Attorney General had condemned two years earlier in congressional testimony noted on the floor of the Senate.¹⁷ No inquiry was made as to whether New York's literacy test had been enacted with the express purpose of disenfranchising minority groups, a matter which the United States itself had earlier brought to the attention of this Court in *Katzenbach v. Morgan*, 384 U.S. 641, 654 (1966). No inquiry was made into the psychological barrier to black registration inherent in literacy tests which the Attorney General had noted two years earlier.¹⁸ And no inquiry of any kind was made of appellants in the instant case, all of whom the United States knew to be vitally interested in the pending request for an exemption from sections 4 and 5. This lack of inquiry is particularly surprising in view of the concern openly expressed in the Senate during the 1970 debates that the Attorney General had or would abuse his discretion by opposing exemptions for southern states while readily acquiescing to any similar requests from the north.¹⁹

Under section 4 of the Voting Rights Act the Attorney General is not vested with the authority to grant exemptions from the federal clearance procedures. Unlike sec-

¹⁶ See 114 Cong. Rec. 5533 (1970).

¹⁷ See 114 Cong. Rec. 6158-59 (Remarks of Senator Dole) (1970).

¹⁸ See 114 Cong. Rec. 5533 (1970).

¹⁹ 114 Cong. Rec. 6166 (Remarks of Rep. Poff), 6521 (Remarks of Senator Ervin), 6621 (Remarks of Senator Ervin).

tion 5, which confers upon the Attorney General discretion to object or assent to changes in voting laws, section 4 provides that exemptions may be given only by a three judge federal court, and then only after that court has made a determination of fact that the jurisdiction involved has not used any tests or devices during the previous 10 years for the purpose or with the effect of denying or abridging the right to vote on account of race or color. This difference between sections 4 and 5 dictates that the Attorney General's consent cannot control the decision or alter the responsibility of the district court. Even in the face of the government's acquiescence in the requested exemption in the instant case, the court below had an unequivocal duty to make an informed and independent judgment concerning the legal and factual issues raised by that request. Particularly in a case such as this, involving as it does matters of great public import, the district court does not function as a mere umpire or moderator bound to accept any arrangement proposed by the named parties, but sits to see that justice is done not only to those parties but to all who may be affected by its decision. Compare *United States v. Rosenberg*, 195 F.2d 583 (2d Cir., 1952), *certiorari denied*, 344 U.S. 838. Under certain circumstances it may be proper, for example, for the district court to call and examine its own witnesses when the parties decline to do so. McCormick on Evidence, 12-14. Certainly in a case such as this, where New York seeks to withdraw the protection of sections 4 and 5 from more than 2 million blacks and Puerto Ricans, and the United States declines either to present the court with relevant evidence or to advance any related legal considerations, the responsibilities imposed upon the district court by section 4 dictate that it accept the assistance of responsible intervenors.

3. The District Court clearly erred in granting the exemption and denying appellants leave to intervene.

Rule 24(a) of the Federal Rules of Civil Procedure provides that intervention shall be permitted as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by the parties." This language is the result of the 1966 amendments intended to liberalize intervention and to make it available to any party whose interests might be substantially affected by the disposition of the action. See Committee Note, 3B Moore's Federal Practice ¶ 24.01[10]. The advisory committee expressly departed from the pre-1966 requirement that the applicant for intervention show that he would be legally bound by the judgment as *res judicata*. Compare *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961). *Apache County v. United States*, 256 F. Supp. 903 (D.Ct. D.C., 1966). A liberal attitude toward private action to vindicate the public interest is generally desirable in litigation arising out of civil rights legislation. Compare *Allen v. Board of Elections*, 393 U.S. 544 (1969).

The requirements of Rule 24(a) are clearly met in the instant case. Appellants have brought suit in the United States District Court for the Southern District of New York to compel the three counties to comply with sections 4 and 5 and submit their redistricting laws for federal approval. *National Association for the Advancement of Colored People v. New York City Board of Elections*, 72 Civ. 1460. Unless the three counties receive an exemption from sections 4 and 5, appellants will almost certainly succeed in obtaining the injunctive relief sought in the

New York action. If, however, the counties obtain such an exemption in the instant action, appellants will of course be unable to compel the counties to submit their redistricting plans to the Attorney General. Appellants also seek to intervene on behalf of themselves, the members of appellant New York N.A.A.C.P., and all other minorities who will be denied the protections of sections 4 and 5 if the three counties are exempted from coverage. This Court has already held, at the urging of the United States, that "[i]t is consistent with the broad purpose of the [Voting Rights] Act to allow the individual citizen standing to insure that his city or county government complies with the §5 approval requirements." *Allen v. Board of Elections*, 393 U.S. 544, 557 (1969). That policy and appellants' interest are the same whether appellants seek to assure such compliance by suing the New York or intervening in the District of Columbia, and apply a fortiori in an intervention such as this one where appellants seek to compel compliance with sections 4 and 5 with regard to all changes in voting laws or practices which may occur in the future. Both because they will be bound in the New York litigation by an exemption in the instant case, and because of the impact on them and of those whom they represent of a withdrawal of the protections of sections 4 and 5, appellants have a substantial interest in the disposition of the instant litigation and are entitled as of right to intervene. Compare *Cascade National Gas Corporation v. El Paso Natural Gas Company*, 386 U.S. 129 (1967). The instant application for intervention also falls within the authority of the court to grant permissive intervention deemed helpful to the court. *Apache County v. United States*, 256 F.Supp. 903, 908 (D.Ct. D.C. 1966).

That the United States does not adequately represent appellants' interests can hardly be disputed. The burden

of showing adequacy of representation is on the party opposing intervention. *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967). The claim of inadequacy in the instant case is not based on a mere tactical disagreement as to how this litigation should be conducted, but upon the express refusal of the United States to present to the district court *any* factual evidence or legal argument in opposition to the requested exemption. Compare *Stadin v. Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir., 1962), *certiorari denied*, 373 U.S. 915; *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir., 1953). The complete failure of representation revealed in the instant case far exceeds the showing of inadequacy found sufficient by this Court in *Cascade Natural Gas Corporation v. El Paso Natural Gas Company*, 386 U.S. 129 (1967).

Nor can the timeliness of appellants' application for intervention be doubted. The motion for intervention was filed 2 days after appellants were informed that the United States had decided not to oppose the requested exemption. Prior to that time the government had consistently indicated that it would oppose the exemption; until the United States suddenly reversed its earlier position there was no reason to question the adequacy of its representation and any motion to intervene would have been premature. Compare *S.E.C. v. Bloomberg*, 299 F.2d 315, 320 (1st Cir., 1962). The motion was made prior to the commencement of any trial, the argument of any motion or the issuance of any orders by the district court. Compare 3B Moore's Federal Practice, ¶ 24.13[1]. The circumstances in the instant case are similar to those in *Pyle-National Co. v. Amos*, 173 F.2d 425 (7th Cir., 1949). In *Pyle-National*, an action by a corporation against its former officers for an accounting for certain sums, a stockholder sought to intervene as a party defendant six months after the litiga-

tion had commenced and a matter of weeks before the scheduled commencement of the trial. The stockholder only moved to intervene when he learned that the corporation was about to consent to judgment for much less than the full amount allegedly misappropriated by the defendants. The Court of Appeals held the application for intervention timely. 172 F.2d at 428.

Appellants' motion for intervention and supporting papers sought to present the theories of discrimination in the use of New York's literacy test which had been urged by the Attorney General and accepted by Congress in enacting the Cooper amendment. Appellants asked an opportunity to show that the literacy test had had the effect or purpose of discriminating on the basis of race because, *inter alia*, the rate of illiteracy was higher among non-whites than among whites, the counties had for many years provided blacks and Puerto Ricans with an education inferior to that provided whites, that many of the black adults had emigrated to New York from southern states where they had attended inferior segregated schools, and the literacy tests were administered in such a way and with the effect of deterring minority group members from attempting to take them. To demonstrate the substantiality of these claims of discrimination, appellants furnished the district court with copies of six official and semi-official reports from 1915 to 1970 documenting the extent of discrimination against minority children in New York City schools,²⁰ developed extensive statistics from available

²⁰ Metropolitan Applied Research Center, *Selection From Stanines Study of 1969-70* (1972); United Bronx Parents, *Distribution of Educational Resources Among the Bronx Public Schools* (1968); Public Education Association, *The Status of the Public School Education of Negro and Puerto Rican Children in New York City* (1955) (A report prepared for the New York City Board of Education); *Report of the Mayor's Commission on Conditions in Harlem*, chapter 5, "The Problem of Education and

census and other data showing the resulting differences in illiteracy rates,²¹ and referred the court to judicial decisions condemning racial discrimination in both the New

Recreation" (1935); Blascoer, *Colored School Children in New York* (1915); *Bulletin of the New York Public Library*, "Ethiopia Unshackled: A brief history of the education of Negro Children in New York City" (1965). The Public Education Association Report, for example, compared facilities in schools with less than 10% blacks and Puerto Ricans (denoted Y schools) with those in schools less than 10 or 15% white students (denoted X schools). The Report found that the average Group X elementary school was 43 years old, while the average group Y elementary school was 31 years old. The average Group X junior high school was 35 years old; the average Group Y junior high school was 15 years old. Group X schools were generally equipped with fewer special rooms than Group Y schools, and principals in Group X schools were generally less satisfied with their facilities and equipment than those in Group Y schools. An average of 17.2 years had gone by since the last renovation of the Group X elementary schools and 4.3 years for the group X junior high schools; renovation had occurred on the average only 9.8 years before in the Group Y elementary schools and 0.7 years earlier in the Group Y junior high schools, even though the Group Y schools were newer to begin with. Twice as many Group X elementary teachers were on probation as in Group Y, 50% more Group Y elementary teachers had tenure than Group X, and more than twice as many Group X elementary school teachers were under-trained permanent substitutes. The Board of Education was spending an average of \$8.30 per student for maintenance in Group Y elementary schools, but only \$5.30 per student in Group X elementary schools. Expenditures for operation of school plant were \$27.50 per child at Group Y elementary schools and \$19.20 per child in Group X elementary schools. The expenditure per student for instruction was \$195 in the Group Y elementary schools and \$185 in the Group X elementary schools. The average class size in ordinary Group X elementary schools was 35.1, compared to 31.1 in the comparable Group Y schools. The Report also concluded that it had not been the policy of the Board of Education in drawing school district lines to seek to ameliorate the racial isolation caused by housing patterns.

²¹ Those statistics revealed the following. Between 1910 and 1960, when most persons of voting age before 1972 received their education, the proportion of non-white children between 7 and 13 not enrolled in school exceeded the white rate by an average of 30%, and was higher in 1960 than ever before. In 1950 the propor-

York City school systems and in school systems in the south from which black residents of the 3 counties had emigrated.²³

Notwithstanding the plainly adequate allegations and substantial evidence of discriminatory use and purpose of New York's literacy test, the district court ruled for the plaintiffs without ever reaching the merits of the issues

tion of children ages 7 to 13 more than one grade behind in school was approximately 75% higher among non-white children than among white children, and the amount by which the non-white rate exceeded the white rate actually rose the longer the children had been enrolled in school. A more recent study showed that white students in white elementary schools were a year and a half to two years ahead of black and Puerto Rican students in non-white New York schools, and the gap in reading ability widened the longer the students were enrolled in school. The tendency of non-white children in non-white schools to fall further and further behind white children in white schools in New York City was noted in *Council of Supervisory Association of the Public Schools of New York City v. Board of Education of the City of New York*, 23 N.Y.2d 458, 463, 297 N.Y.S.2d 547, 551, 245 N.E.2d 204, 207 (1969) modified on appeal, 24 N.Y.2d 1029, 302 N.Y.S.2d 850, 250 N.E.2d 251. In 1960, while literacy tests were employed in all three counties, the rate of illiteracy among non-whites was 200% higher than among native whites in New York County, 270% higher than among native whites in Kings County, and 310% higher than among native whites in Bronx County. In *Gaston County v. United States* the rate of illiteracy among blacks was only 70% higher than among whites. 288 F.Supp. 678, 687 (D.C. Cir., 1968).

²³ *Chance v. Board of Examiners*, 330 F.Supp. 203 (S.D.N.Y., 1971) (Examinations used by 80 year old Board of Examiners of the City of New York discriminated against non-white applicants for employment in the public school system); *In Re Skipwith*, 180 N.Y.S.2d 852, 14 Misc. 2d 325 (1958); *Gaston County v. United States*, 395 U.S. 285 (1969). The court in *Skipwith* found *inter alia*, (a) that the New York public schools were segregated on the basis of race, (b) that this segregation, whether or not purposeful, had a harmful effect on the education of the non-white children, (c) that the use of less qualified substitute teachers was almost twice as frequent in non-white schools as in white schools in the three counties, (d) that there was a higher proportion of inexperienced teachers in the non-white schools.

raised. The motion of appellants which was accompanied by the extensive documentation and statistics noted above was denied by the court the day after it was filed. In as much as the court below issued no opinions in connection with this case, it is impossible to determine why appellants' motion to intervene was denied. The final judgment appealed from merely recites that plaintiff's motion for summary judgment is granted. There was no express determination by the district court regarding the discriminatory purpose or effect of New York's literacy test; it is unclear whether the members of the court ever made such a determination, or instead felt authorized or compelled by the government's position to simply grant the motion for summary judgment. Although section 5 requires the district court to retain jurisdiction in this action for a period of five years after judgment, the United States did not ask the court to retain jurisdiction and that court did not do so. The proceedings in the district court were, in sum, entirely devoid of the caution and scrutiny which Congress can be assumed to have contemplated would be exercised before the protections of sections 4 and 5 were withdrawn from over 2 million blacks and Puerto Ricans.²²

The mere fact that appellants seek to intervene on the side of the United States does not preclude granting that request. This Court has already held that private parties may seek to step forward and seek to vindicate the public interest when dissatisfied with the government's handling of a case in which they have a substantial interest. *Cascade*

²² Since the district court never actually entered a declaratory judgment determining that no test or device as defined in the Act had been used during the previous 10 years for the purpose or with the effect of denying or abridging the right to vote on account of race or color, the purported exemption does not meet even the literal requirements of the statute.

Natural Gas Corporation v. El Paso Natural Gas Company, 386 U.S. 129 (1967). The instant case does not involve any settlement negotiated by the United States to which a private party seeks to object and the United States did not oppose the motion for intervention. Appellants do not seek to substitute their judgment for that of the United States on some matter of public policy. Compare *Cascade Natural Gas*, 386 U.S. at 141-161 (dissent of Justice Stewart). Nor do appellants seek to introduce before the district court factual material presented earlier and without success to the United States. Compare *Apache County v. United States*, 256 F.Supp. 903 (D.Ct. D.C., 1966). The legal theories which appellants ask to present as to what constitutes discriminatory purpose or effect are the very theories urged by the United States before this Court in *Katzenbach v. Morgan* and *Gaston County v. United States*, advanced by the Attorney General at congressional hearings on the instant statute, and accepted by the Congress which voted the Cooper amendment into law. The evidence which appellants seek to introduce is the evidence plainly relevant under those accepted interpretations of section 4 which the United States neither sought on its own nor asked or permitted appellants to bring to its attention. Under these circumstances the decision of the district court denying appellants' motion to intervene was not only erroneous under Rule 24 but inconsistent with the policies of the Voting Rights Act.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted, and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Order of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2419-71

NEW YORK STATE, on behalf of New York, Bronx
and Kings Counties,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant,

N.A.A.C.P., NEW YORK CITY REGION OF NEW YORK STATE
CONFERENCE OF BRANCHES, et al.,

Applicants for Intervention.

This matter came before the Court on Motion by plaintiff, New York State, for Summary Judgment, a response by defendant, United States of America, consenting to the entry of such judgment, and a Motion to Intervene as party defendants by the N.A.A.C.P., New York City Region of New York State Conference of Branches, et al.

Upon consideration of these Motions, the memoranda of law submitted in support thereof, and opposition thereto, it is by the Court, this 12th day of April 1972,

ORDERED that said Motion to Intervene as party defendants by N.A.A.C.P., New York City Region of New York

Order of the District Court

State Conference of Branches, et al. should be and the same hereby is denied, and it is

FURTHER ORDERED that the Motion for Summary Judgment by plaintiff, New York State, should be and the same hereby is granted.

/s/ EDWARD ALLEN TAMM

/s/ WILLIAM B. JONES

/s/ JUNE GREEN

FILED

APRIL 13, 1972

JAMES F. DAVEY, Clerk

Judgment of the District Court
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2419-71

**NEW YORK STATE, on behalf of New York, Bronx
 and Kings Counties,**

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant,

**N.A.A.C.P., NEW YORK CITY REGION OF NEW YORK STATE
 CONFERENCE OF BRANCHES, et al.,**

Applicants for Intervention.

Before TAMM, Circuit Judge, JONES and GREEN, District
 Judges.*

ORDER

The Motion of N.A.A.C.P., New York City Region of
 New York State Conference of Branches, et al., to Alter
 the Judgment of the Court in this action, entered April 12,
 1972, denying their Motion to Intervene as party defen-
 dants and granting plaintiff New York State's Motion for
 Summary Judgment, having come before the Court at this
 time; and having considered the memoranda, affidavits

*GREEN, District Judge, did not participate in this decision.

Judgment of the District Court

and exhibits submitted in support of the Motion to Alter Judgment, the Court enters the following Order pursuant to Local Rule 9(f), as amended January 1, 1972.

Wherefore, it is this 25th day of April, 1972.

ORDERED: That the Motion of N.A.A.C.P., et al., to Alter the Judgment of the Court in this action be and the same is hereby denied.

/s/ EDWARD ALLEN TAMM
Circuit Judge

/s/ WILLIAM B. JONES
District Judge

Notice of Appeal**UNITED STATES DISTRICT COURT****DISTRICT OF COLUMBIA****Civil Action No. 2419-71**

**NEW YORK STATE, on behalf of New York, Bronx,
and Kings Counties,**

Plaintiff,

—against—

UNITED STATES OF AMERICA,

Defendant,

N.A.A.C.P., etc., et al.,

Applicants for Intervention.

NOTICE OF APPEAL**TO THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that the N.A.A.C.P., New York City Region of New York State Conference of Branches, Antonia Vega, Simon Levine, Samuel Wright, Waldaba Stewart and Thomas R. Fortune, applicants for intervention in the above mentioned action, hereby appeal to the Supreme Court of the United States from the final order entered in this action on April 13, 1972, denying applicants' application for intervention and granting a declaratory judgment in favor of the plaintiff and the final order entered in this action on April 25, 1972, denying applicants' motion to alter judgment.

This appeal is taken pursuant to 42 U.S.C. §1973b(a).

Notice of Appeal

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APPENDIX B**Memorandum of the United States**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 2419-71

NEW YORK STATE on behalf of New York, Bronx and
KINGS COUNTIES, political subdivisions of said State,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

DEFENDANT'S MEMORANDUM AND AFFIDAVIT IN RESPONSE TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Based on the facts set forth in the affidavits attached to plaintiff's Motion for Summary Judgment and the reasons set forth in the attached affidavit of David L. Norman, Assistant Attorney General, the United States hereby consents to the entry of a declaratory judgment under Section 4(a) of the Voting Rights Act of 1965 (42 U.S.C. 1973 b (a)).

DAVID L. NORMAN

Assistant Attorney General
Civil Rights Division

Affidavit of the Assistant Attorney General

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON,

DAVID L. NORMAN, having been duly sworn, states as follows:

My name is David L. Norman. I am Assistant Attorney General, Civil Rights Division, Department of Justice. I make this affidavit in response to the plaintiff's Motion for Summary Judgment in the case of *New York State v. United States of America*, Civil Action No. 2419-71, United States District Court for the District of Columbia. I am familiar with the Complaint filed by the plaintiff and with the Answer filed by the United States herein.

Following the filing of the Complaint, the United States, pursuant to the requirements of Section 4(a) of the Voting Rights Act of 1965, as amended (42 U.S.C. 1973b(a)), undertook to determine if the Attorney General could conclude that he has no reason to believe that the New York State literacy test has been used in the counties of New York, Bronx and Kings during the preceding 10 years for the purpose or with the effect of denying or abridging the right to vote on account of race or color, and thereby consent to the judgment prayed for. At my direction, attorneys from the Department of Justice conducted an investigation which consisted of examination of registration records in selected precincts in each covered county, interviews of certain election and registration officials and interviews of persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties,

I have reviewed and evaluated the data obtained through this investigation in light of the statutory guidelines set forth in Section 4(a) and (d) of the Voting Rights Act of

Affidavit of the Assistant Attorney General

1964 (42 U.S.C. 1973b (a) and (d))). In my judgment the following facts are relevant to the issue of whether the New York literacy test "has been used during the ten years preceding the filing of [this] action for the purpose or with the effect of denying or abridging the right to vote on account of race or color" and to the question of whether the Attorney General should determine "that he has no reason to believe" that the New York literacy test has been used with the proscribed purpose or effect:

1. New York presently has suspended all requirements of literacy as a condition of registration and voting as required by the 1970 Amendments to the Voting Rights Act. Our investigation revealed no allegation by black citizens that the previously enforced literacy test was used to deny or abridge their right to register and vote by reason of race or color.

2. Section 4(e) of the Voting Rights Act of 1965 modified the New York English language literacy requirements by providing that the literacy requirement could be satisfied by proof of attendance through the sixth grade at any American-flag school, including those in Puerto Rico. This Act was passed on August 6, 1965 and was finally upheld by the United States Supreme Court (*Katzenbach v. Morgan*, 384 U.S. 641) on June 16, 1966. Our investigation indicated that the implementation of this provision through the use of Spanish language affidavits was not completed until the fall of 1967.

The supplemental affidavit of Alexander Bassett dated March 30, 1972, indicates that New York authorities took significant interim steps to minimize any adverse impact resulting from the delay in making available Spanish

Affidavit of the Assistant Attorney General

language affidavits. Our investigation did not reveal any individual citizens whose inability to register is attributable to the absence of Spanish language affidavits.

3. The 1970 Amendments to the Voting Rights Act suspended in all jurisdictions any use of literacy tests or devices. These Amendments were effective on June 22, 1970, and were upheld by the United States Supreme Court (*Oregon v. Mitchell*, 400 U.S. 112), in December 1970. Our investigation included a sampling of registration records in 21 election districts in the three covered counties. While there is no evidence that the state continued to require a formal literacy test after the Act (except in isolated cases), in each election district examined, a significant percentage of those registration applications examined after June 1970 bear a notation that some proof of literacy was recorded.

The supplemental affidavit of Alexander Bassett indicates that New York authorities took reasonable steps to notify all registration workers of the suspension of all literacy requirements and that notations of proof of literacy resulted from either (a) obtaining such proof contingently in the event the courts ruled in New York's favor in the challenge of the literacy suspension or (b) isolated instances where individual registration officials continued to obtain literacy contrary to official instructions.

Based on the above findings I conclude, on behalf of the Acting Attorney General that there is no reason to believe that a literacy test has been used in the past 10 years in the counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, except for isolated instances

Affidavit of the Assistant Attorney General

which have been substantially corrected and which, under present practice cannot reoccur.

DAVID L. NORMAN

Assistant Attorney General

Civil Rights Division

Sworn to and subscribed
before me this 3rd day
of April 1972

Notary Public

My commission expires

OCTOBER TERM, 1972

MICHAEL RODAK, JR., CL

No. 72-129

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE, NEW YORK CITY REGION OF NEW YORK CON-
FERENCE OF BRANCHES, et al.,

Appellants-Applicants for Intervention,

v.

NEW YORK, on behalf of New York, Bronx, and
Kings Counties,

Appellee.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE, NEW YORK CITY REGION OF NEW YORK CON-
FERENCE OF BRANCHES, et al.,

Appellants-Applicants for Intervention,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION TO DISMISS OR AFFIRM

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Appellants have failed to establish that the Court below abused its discretion in denying appellants' motion to intervene or that their appeal presents a substantial federal question	4
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

**NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE, NEW YORK CITY REGION OF NEW YORK CON-
FERENCE OF BRANCHES, et al.,**

Appellants-Applicants for Intervention,

v.

**NEW YORK, on behalf of New York, Bronx, and
Kings Counties,**

Appellee.

**NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE, NEW YORK CITY REGION OF NEW YORK CON-
FERENCE OF BRANCHES, et al.,**

Appellants-Applicants for Intervention,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, appellee State of New York, on behalf of New York, Bronx and Kings Counties, moves to dismiss or affirm on the grounds that the questions presented by this appeal are not justiciable and/or are so unsubstantial as not to require further argument.

Statement

This action was commenced by the service of a complaint by the appellee State of New York on the appellee United States of America on December 3, 1971.* The relief sought in the complaint was for a declaratory judgment under § 4(a) of the Voting Rights Act of 1965, Public Law 89-1101, 70 Stat. 438, 42 U.S.C. § 1973(b) as amended by Public Law 91-285, 94 Stat. 315, that during the ten preceding years, the voting qualifications prescribed in the laws of New York did not deny or abridge the right to vote of any individual on account of race or color, and that the provisions of §§ 4 and 5 of the Voting Rights Act were, therefore, inapplicable in the Counties of New York, Bronx, and Kings in the State of New York.

The aforementioned counties had come within the purview of the Voting Rights Act, because of a determination made by the Bureau of Census that in 1968 less than 50% of the persons of voting age residing in those counties had voted in the Presidential election,** and since New York State, during the years prior to 1970, imposed a literacy requirement as a qualification for voting. N.Y. State Const. Art. II, § 1; N.Y. Election Law §§ 150, 168.

On March 10, 1972 the United States filed an answer to the amended complaint which did not deny the allegations

* An amended complaint dated December 16, 1971 was subsequently filed.

** The percentage of the voting age population who voted for president in 1968 was determined by the Bureau of the Census to be 45.7% in New York County, 47.4% in Bronx County and 46.4% in Kings County. When the number of voters who participated in the 1968 general election in New York but who did not vote for the office of president is added, the percentage of voting age population who voted in the 1968 election would be 47.7% in New York County, 49.6% in Bronx County and 48.5% in Kings County. Amended Compl., para. 14.

of said complaint except that with respect to a few specific allegations concerning the administration of the literacy test, the answer stated that defendant was without knowledge or information sufficient to form a belief.

Subsequently, on March 17, 1972, the appellee New York moved for summary judgment. Appellees' moving papers included an affidavit from Winsor A. Lott, chief of the Bureau of Elementary and Secondary Educational Testing of the New York State Education Department which annexed copies of all the literacy tests that were used during the years 1961 through 1969 and which attested to the fact that less than 5% of the applicants who have taken these tests have failed. It was also established that in 1968, less than 5% of the applicants who took the literacy test in each of the three affected counties failed. Amended Compl., para. 12, see also Exh. "1" to the answer of the defendant United States of America. Affidavits in support of the motion for summary judgment were also submitted by representatives of the Boards of Elections in each of the three affected counties attesting to the manner in which satisfaction of literacy was established prior to 1970 when the literacy test was suspended, and attesting to registration drives that were conducted during the 1960's, particularly in predominantly black and Puerto Rican areas of New York City seeking to encourage minority members to register.

After a four-month investigation by attorneys from the Department of Justice which included an examination of registration records of selected persons in New York, Bronx and Kings Counties, interviews with election and registration officials and interviews with persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties (Juris. State., p. 8a), an affidavit was filed on April 4, 1972 by David L. Norman, Assistant Attorney General in charge of the Civil Rights Division. The Norman affidavit stated that on the basis of that investigation conducted by the Department of

Justice "there was no reason to believe that a literacy test has been used in the past 10 years in the counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, except for isolated instances which have been substantially corrected and which, under present practice cannot reoccur." Accordingly, the United States consented to the entry of the declaratory judgment.

Although the nature of this action was public knowledge shortly after it was filed with the Department of Justice (an article concerning the nature of the action appeared in the *New York Times* on February 6, 1972), appellees did not move to intervene as defendants in this action until April 7, 1972. On April 11, 1972 appellee New York filed an affidavit and memorandum in opposition to the motion to intervene. On April 13, 1972 the three-judge federal court denied without opinion appellant's motion to intervene and granted appellee New York's motion for summary judgment.

On April 24, 1972 appellants moved to alter the prior judgment. The motion was denied on April 25, 1972. Thereafter appellants filed a notice of appeal with this Court with respect to the order denying this application to intervene on April 13, 1972 and the order denying their motion to alter judgment.

**APPELLANTS HAVE FAILED TO ESTABLISH
THAT THE COURT BELOW ABUSED ITS DIS-
CRETION IN DENYING APPELLANTS' MO-
TION TO INTERVENE OR THAT THEIR
APPEAL PRESENTS A SUBSTANTIAL FED-
ERAL QUESTION**

Section 4(a) of the Voting Rights Act of 1965 and as amended by the Voting Rights Act of 1970 provides a state or subdivision with the right to request declaratory judg-

ment so that it may be exempted from the compliance requirements of § 5. See cases cited in *Gaston County v. United States*, 288 F. Supp. 678, 679 n. 1 (D.D.C. 1968). The determination as to whether the test or device, which triggered the applicability of § 4, has been used to deny or abridge an individual's right to vote on account of race or color rests with the United States District Court, although the United States Attorney General may consent to the entry of such a judgment.

The Voting Rights Act "makes no express provision for intervention", but "rather contemplates that the Attorney General will protect the public interest in defending section 4(a) actions." *Apache County v. United States*, 256 F. Supp. 903, 906 (D.D.C. 1966). While there is no statutory or absolute right to intervene in § 4(a) actions, the district courts have recognized the right of private parties to seek permissive intervention pursuant to FRCP Rule 24(a)(2) where the requirements of that section have been satisfied and where the applicant for intervention can establish that the Attorney General has been derelict or deficient in protecting the public interest. But "such intervention is not to be permitted except upon a strong showing." *Apache County v. United States*, *supra*, at 908.

Upon the record before it, the District Court had no choice other than to deny appellants' motion for intervention where (1) appellants did not establish that they had standing, (2) the motion was not timely and would have seriously disrupted New York's electoral processes, (3) appellants have other adequate legal means of protecting their interests, and (4) where appellants failed to establish that the Justice Department had not adequately protected the public interest or (5) that New York's literacy test had denied any individual the right to vote on account of race or color.

(1)

Every one of the named individual appellants were and are duly registered voters in the State of New York. Appellants' papers submitted to the District Court fail to establish how any of these individuals would be directly injured by the entry of the declaratory judgment in this action.

Since appellants are assuming that they have the same rights as the original parties in this action, they must be held to the same standards in determining whether they have proper standing. "Mere concern without a more direct interest cannot constitute standing in the legal sense" sufficient to challenge the exercise of responsibility of the Justice Department in this action. *Sierra Club v. Morton*, 401 U.S. 907.

(2)

Although the institution of this action was public knowledge since the filing of a complaint on December 3, 1971 and was mentioned in prominent newspaper articles (see New York Times, Feb. 6, 1972), appellants did not move to intervene until April 7, 1972. Appellants' contention that it waited until the Justice Department's defense was completed before seeking to intervene is a patently baseless excuse for delay. If such a contention were to be sustained, it would require a plaintiff to win two separate rounds in every lawsuit: first against the named defendant, and secondly against the intervenors who were watching from the sidelines until the defense's case was completed.

In determining whether to exercise its discretion to permit intervention, a district court must also consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." FRCP Rule 24(b); see *Allen Company v. National Cash Register Company*, 322 U.S. 137.

The granting of appellants' motion to intervene at the time it was brought would have seriously disrupted New York's electoral process. A legislative redistricting statute providing for new assembly and senate districts in the State of New York based on 1970 census figures was enacted in January, 1972 and new congressional districts were provided by a statute enacted in March, 1972.* The State of New York was aware of the fact that a detailed Justice Department investigation into the consequences of each of the new assembly, senate and congressional lines in three large counties within New York City might require several months to complete which would have prevented the use of the new district lines in the Spring, 1972 primary elections. Since there was no question that the filing requirements of § 5 of the Voting Rights Act were due to the statistical presumptions imposed by § 4 rather than by any evidence that New York's literacy test had discriminated against any individual by reason of race or color, the present lawsuit was instituted to prevent any delay in having the legislative and congressional districts at stake in the 1972 elections governed by 1970 census figures.

The delay sought by appellants' belated intervention would have unquestionably resulted in the holding of primary and general elections in New York State based on population figures that were 12 years out of date.

(3)

The denial by the District Court of appellants' motion for intervention has not prevented them from their purportedly ultimate objective of protecting the voting rights of black citizens. If they believe that any of the new

* Correct 1970 census figures for the State of New York were not supplied to the New York Joint Legislative Committee on Reapportionment by the United States Bureau of the Census until October 15, 1971.

assembly, senate or congressional district lines were the product of racial discrimination and violative of the Fourteenth and/or Fifteenth Amendments they may seek remedial relief in a civil rights action in one of the federal district courts in the State of New York. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339. Indeed, there is no reason why appellants could not have amended their present action in the Southern District of New York (*NAACP v. New York City Board of Elections*, 72 Civ. 1460) to seek such relief unless their reluctance to do so results from a lack of evidence to support such charges.

(4)

Appellants have failed to sustain their heavy burden of proof of showing that the Justice Department was derelict or deficient in protecting the public interest in its defense of this action. *Cf. Apache County v. United States*, *supra*.

The Justice Department conducted a four-month investigation into the allegations of the complaint before consenting to the entry of a declaratory judgment. As noted in the affidavit of the Assistant Attorney General in charge of the Civil Rights Division (Juris. State. 8a-11a), attorneys from the Department of Justice examined registration records of selected persons in each covered county, conducted interviews with election and registration officials and interviews with persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties. In answer to the Justice Department's request, the Board of Elections supplied the Department with selected election districts in each of the three affected counties that were predominantly white, predominantly black, predominantly Puerto Rican and districts that contained mixed populations. The Justice Department was unable to uncover any evidence that would indicate that the predominantly black or Puerto Rican districts suffered

as a result of the imposition of English language literacy tests or were treated any differently than predominantly white election districts.

If appellants were in possession of any evidence that individuals were subjected to discrimination by reason of their race or color in the conduct of the literacy tests, they could have presented such evidence to the Justice Department. None of appellants' papers indicate that they are in possession of such evidence.

(5)

Certainly, the mere fact that New York imposed an English literacy requirement cannot be cited as evidence of racial discrimination. The right of a state to impose an English literacy requirement has been sustained by this Court. *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45. Although New York's literacy requirements may no longer be enforced to the extent that they are inconsistent with 42 USC § 1973(b)(c), courts have refused to declare that New York's literacy requirements constituted a denial of equal protection. *Camacho v. Rogers*, 199 F. Supp. 155 (S.D.N.Y. 1961); *Socialist Worker Party v. Rockefeller*, 314 F. Supp. 984, 999 (S.D.N.Y., 1970); *Cardona v. Power*, 384 U.S. 672.

It may be remembered that when South Carolina attacked the constitutionality of the 1965 Voting Rights Act on the grounds that § 4 actions would place an impossible burden of proof upon states and political subdivisions, this Court noted that the Attorney General had pointed out during hearings on the Act that "an area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then refute whatever evidence to the contrary may be adduced by the Federal Government." *South Carolina v. Katzenbach*, 383 U.S. 301, 332.

The State of New York clearly met its burden entitling it to a declaratory judgment.

The affidavit of Winsor A. Lott, which contains copies of all literacy tests that were given by the State of New York from 1961 to 1969 shows that the literacy tests consisted of a short paragraph in simple English followed by eight questions which could be answered in one or a few words. The answers were found in the paragraph. No outside knowledge was required. The tests were distributed with corresponding answer keys geared to minimize the discretion of the graders. Anyone with a minimal amount of English comprehension should have been able to pass the test. The evidence established that over 95% of the applicants each year who took the literacy test passed it throughout the State and in each of the three affected counties.

The failure of any person to register and vote in the Counties of New York, Bronx and Kings is and was in no way related to any purpose or intent on the part of the officials of those counties or the State of New York to deny or abridge the right of any person to vote on account of race or color.

Indeed, the named counties have in the past actively encouraged the full participation by all of its citizens in the affairs of government.

Central registration takes place throughout the year at the Board of Elections. Local registrations are also conducted every October for a three or four day period. In each county in New York City and in each election district in each county are polling places designated for local registration. See affidavit of Alexander Bassett, sworn to March 16, 1972, p. 3.

To further expand the number of registrants in New York, since 1966, if the prospective registrant demonstrated

by certificate, diploma or affidavit that he had completed the sixth grade in a public school in, or private school accredited by any State of the Commonwealth of Puerto Rico, in which the pre-administrative language was Spanish, he was permitted to register without proof of literacy in English. July 28, 1966, Op. Atty. Gen., 121. The Attorney General of New York set forth guidelines recommending that the affidavits be printed in English and Spanish to avoid language difficulties. In 1967, this became the practice (See affidavit of Bassett, *supra*, p. 2).

Moreover, beginning in 1964, New York City embarked upon an intensive effort to gather new voters at considerable expense. Every year since, except 1967, the Board of Elections has sponsored *summer* registration drives to encourage more people to register. In 1964, registrations were conducted in local firehouses throughout the City (Affidavit of Beatrice Berger, sworn to March 17, 1972). In 1965, mobile units were sent out into very populated areas containing a high density of blacks. Thereafter, local branches of the Board of Elections were set up throughout the City. These branches were specifically set up also in areas with a high population of black residents. With each new voter registration drive came a waive of publicity in the news media requesting citizens to register (Berger affidavit, p. 2).

Thus, far from discriminating against new voters by reason of race or color, the State of New York has actively sought to encourage members of minority groups to register and vote.

CONCLUSION

For the foregoing reasons, the within motion to dismiss or affirm should be granted.

Dated: New York, New York, August 21, 1972.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-129

**NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE, NEW YORK CITY REGION OF NEW
YORK CONFERENCE OF BRANCHES, ET AL., APPELLANTS**

v.

UNITED STATES OF AMERICA, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the United States moves that the judgment of the district court be affirmed or, in the alternative, that the appeal be dismissed.

DECISION BELOW

The order of the district court (J.S. App. 1a-2a) is not reported.

JURISDICTION

The district court entered its order denying intervention on April 13, 1972. A motion to alter judgment was denied on April 25, 1972. A notice of appeal was filed on May 11, 1972. The Jurisdictional Statement

(1)

was filed on July 21, 1972. The jurisdiction of this Court is invoked under 42 U.S.C. 1973b(a).

QUESTION PRESENTED

Whether the district court erred in denying intervention in this suit seeking a declaratory judgment under Section 4(a) of the Voting Rights Act of 1965.

STATEMENT

On December 3, 1971, the State of New York, on behalf of New York, Bronx and Kings Counties, filed suit in the United States District Court for the District of Columbia under Section 4(a) of the Voting Rights Act of 1965, as amended (42 U.S.C. 1973b(a)), seeking a declaratory judgment granting an exemption from certain provisions of that Act.¹ New York filed a motion for summary judgment on March 17, 1972.

On April 3, 1972, the United States filed a memorandum consenting to the entry of a declaratory judgment under Section 4(a) of the Voting Rights Act of 1965 (42 U.S.C. 1973b(a)), together with an affidavit of an Assistant Attorney General on behalf of the Acting Attorney General, stating that (J.S. App. 10a-11a):

There is no reason to believe that a literacy test has been used in the past 10 years in the counties of New York, Kings and Bronx with

¹ The three New York counties were made subject to the provisions of Sections 4(a) and 5 of the Voting Rights Act by the 1970 Amendments to that Act, P.L. 91-285, 84 Stat. 315; see 42 U.S.C. 1973b, 1973c, and a subsequent determination by the Bureau of the Census, see 36 Fed. Reg. 5809 (March 27, 1971).

the purpose or effect of denying or abridging the right to vote on account of race or color, except for isolated instances which have been substantially corrected and which, under present practice, cannot reoccur.

On April 7, 1972, the appellants herein, the National Association for the Advancement of Colored People (NAACP) and five individuals, filed a motion seeking to intervene as a party defendant. On April 13, 1972, the district court, without opinion, denied the motion to intervene and entered judgment for New York. On April 24, 1972, appellants moved the district court to alter its judgment. The district court, without opinion, denied this motion on April 25, 1972.

ARGUMENT

While the district court did not set forth the reasons for denying the motion to intervene, there are at least two sufficient bases for sustaining the court's action. First, it was within the court's discretion to hold that the motion to intervene was not timely filed. Second, the judgment of the district court does not deprive appellants of any rights.

1. The requirement that a motion to intervene be timely is applicable both to intervention as of right under Rule 24(a), Fed.R.Civ.P., and permissive intervention under Rule 24(b). *Lumbermens Mutual Casualty Company v. Rhodes*, 403 F.2d 2, 5 (C.A. 10), certiorari denied, 394 U.S. 965.

Although the complaint here had been filed in December 1971 and the existence of the suit was a subject of a news article in the *New York Times* in Feb-

ruary 1972,² appellants did not seek to intervene until several weeks after New York's motion for summary judgment had been filed. In these circumstances, it was within the discretion of the district court to determine that the application was untimely, particularly since delay in adjudication of the action for declaratory judgment might have interfered with the implementation of New York's recently adopted reapportionment plans.³

2. The declaratory judgment entered by the district court released the three New York Counties from the obligations of Sections 4 and 5 of the Voting Rights Act of 1965. In our view such a declaratory judgment does not affect any legal right of appellants, and, accordingly, the denial of intervention could have been appropriately predicated on that ground.

In the declaratory judgment action, the district court merely determined, in effect, whether the submission procedures required under Section 5 of the Voting Rights Act of 1965 were applicable to the

² See New York's Motion to Affirm or Dismiss, p. 4.

³ In an attempt to suggest that the motion to intervene was timely, appellants state that their counsel was expressly assured by attorneys from the Department of Justice that "the United States would oppose any exemption for the three counties and was preparing papers in opposition to the motion for summary judgment" (J.S. 10, 22). While we were not called upon to present evidence on this point in the district court, it is our position that appellants' statements are not an accurate representation of the substance of the conversations between counsel for appellants and attorneys for the government. While this Court is not the appropriate place to present evidence on this question, we will, if appropriate and relevant, present such evidence in the district court should any further hearing be held in this action.

three New York counties.⁴ The Attorney General, when he determined "that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. 1973b(a), consented to the entry of the declaratory judgment as required by the statute.⁵

The action of the Attorney General and the subsequent judgment entered by the district court do not impair the ability of appellants to protect their Fifteenth Amendment rights. Under the 1970 Amendments to the Voting Rights Act, see 42 U.S.C. 1973aa, New York may not impose a literacy test as a prerequisite to voting before August 6, 1975, regardless of the outcome of this litigation. With respect to reapportionment matters, which appear to be appellants' primary concern (J.S. 9, 21), appellants may seek relief in the courts without reference to the Voting Rights Act if they believe there has been a violation of their Fourteenth or Fifteenth Amendment rights. See, *e.g.*, *Wright v.*

⁴ If a declaratory judgment under Section 4(a) had not been entered, the three counties would also be subject to Section 6 (examiners) and Section 8 (observers) of the Voting Rights Act, 42 U.S.C. 1973d, 1973f. (Neither New York nor appellants advert to those aspects of the statute.)

⁵ 42 U.S.C. 1973b(a) provides in relevant part:

"If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment."

Rockefeller, 376 U.S. 52; *Gomillion v. Lightfoot*, 364 U.S. 339.

The district court's declaratory judgment affects appellants only with regard to their presentation of evidence either to the Attorney General or to the District Court for the District of Columbia when and if there is a change affecting voting in one of the three New York counties to which Section 5 of the Voting Rights Act would apply. But the district court could properly conclude that this was not of sufficient magnitude to require disruption of the orderly processes of the court by allowing private parties to intervene in the suit immediately prior to the entry of the judgment, particularly since the courts are, in any event, available to hear any allegation by appellants that their rights have been denied.

CONCLUSION

For the foregoing reasons, the orders of the district court denying appellants' motions to intervene and to alter judgment should be affirmed, or, in the alternative, the appeal should be dismissed.*

Respectfully submitted.

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DAVID L. NORMAN,
Assistant Attorney General.

SEPTEMBER 1972.

* In recent years this Court has affirmed, rather than dismissed for want of jurisdiction, when there has been an appeal from denial of a motion to intervene as of right. See our Motion to Affirm in *Syufy Enterprises v. United States*, No. 70-829, Oct. Term 1971, affirmed, 404 U.S. 802.

In re

WILLIAM WALKER, JR.

Supreme Court of the United States

October Term, 1973

No. 73-139

NATIONAL ASSOCIATION FOR THE
IMPROVEMENT OF NEGRO FINANCIAL AID, et al.

Appellants.

New York, et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT
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MICHAEL BODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-129

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, *etc., et al.*,
Appellants,

—v.—

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-129

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, *etc., et al.*,
Appellants,

—v.—

NEW YORK, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

Opinion Below

The District Court for the District of Columbia issued no opinion in connection with this case. The order of the District Court, entered April 13, 1972, denying appellants' motion to intervene, and the order of the District Court, entered April 25, 1972, denying appellants' motion to alter judgment, are set out in the printed Appendix, pp. 71a and 117a.

Jurisdiction

This suit was brought by the State of New York, under 42 U.S.C. §1973b, to obtain for three counties of that state an exemption from certain provisions of the Voting Rights

Act of 1965, as amended. The matter was heard before a three-judge panel pursuant to 42 U.S.C. §1973b and 28 U.S.C. §2284. Shortly after the United States declined to oppose the granting of such an exemption, appellants moved to intervene as party defendants. The judgment of the District Court denying that motion and granting the exemption was entered on April 13, 1972, and the order of the District Court denying appellants' motion to alter judgment was entered on April 25, 1972. The notice of appeal was filed timely in that court on May 11, 1972. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 42, United States Code, section 1973b(a). The jurisdiction of this Court is discussed in detail at pp. 13-16, *infra*.

The Question Presented

Where the State of New York sues for an exemption from sections 4 and 5 of the Voting Rights Act of 1965, as amended, and the United States expressly and without justification declines to defend the action, should intervention be granted to a civil rights group and individuals who have initiated other litigation to compel compliance with sections 4 and 5 and who offer specific allegations and substantial documentary evidence in opposition to the granting of such an exemption?

Statutes Involved

The statutes involved are Section 1973b and 1973c, 42 United States Code, sections 4 and 5 respectively of the 1965 Voting Rights Act as amended, and are set out in the Statutory Appendix hereto, pp. S.A.1-S.A.5.

Statement of the Case

Under the 1970 amendments to the Voting Rights Act of 1965, three counties in the state of New York—Bronx, Kings (Brooklyn) and New York (Manhattan)—are subject to coverage by sections 4 and 5 of the Act, 42 U.S.C. §§1973b and 1973c. Those sections are applicable because on November 1, 1968, New York State employed a literacy test as a prerequisite to registration and less than 50 percent of the persons of voting age were registered on that date or voted in the 1968 presidential election in each of those three counties. 42 U.S.C. § 1973b(b). Section 5 provides that no changes in the election laws or practices of such covered areas may be enforced until the state or subdivision involved has either submitted those changes to the Attorney General without his objecting to them for a period of 60 days, or has obtained a declaratory judgment from the United States District Court for the District of Columbia that the changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973c(a). Section 4 prohibits the use of literacy tests and other tests and devices. Section 4 also provides that a state or subdivision subject to this advance clearance procedure may obtain an exemption therefrom by bringing an action for a declaratory judgment against the United States and obtaining from the United States District Court for the District of Columbia a determination that the literacy test employed by the state or subdivision has not been used during the 10 years preceding the filing of that action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, 42 U.S.C. § 1973b(a).

On December 3, 1971, the state of New York brought this action in the United States District Court for the District of Columbia to secure an exemption for New York, Bronx and Kings counties.¹ The United States answered on March 10, 1972.² On March 17, 1972, New York moved for summary judgment.³

During the pendency of this matter, but prior to any action therein by the District Court, the State of New York enacted legislation altering the boundaries of the congressional, Assembly, and State Senate districts in the three counties. The statute altering the Assembly and Senate districts was enacted on January 14, 1972, and on January 24, 1972 these changes were submitted to the Attorney General by the state of New York. On March 14, 1972, the Attorney General rejected the submission on the ground that it lacked information required by the applicable regulations. 36 Fed. Reg. 18186-190. The changes in the congressional districts, enacted on March 28, 1972, were never submitted to the Attorney General. Immediately upon the passages of these two redistricting laws and despite the absence of compliance with sections 4 and 5, officials in all three counties took steps to implement the changes, including redistribution of voter registration cards among the new districts and printing and distributing nomination petitions.

On March 21, 1972, counsel for appellants advised the Department of Justice by telephone that appellants intended to bring an action to enjoin enforcement of the new district lines until section 5 had been complied with,

¹ The amended complaint is set out on pp. 2a-11a.

² The answer is set out on pp. 12a-14a.

³ The motion and supporting papers are set out on pp. 15a-32a.

and indicated that appellants would urge the Attorney General to object to the new district lines when they were submitted to him on the ground, *inter alia*, that the lines had been drawn in such a way as to minimize the voting strength of blacks, Puerto Ricans, and other minorities. Such an action was filed by appellants 17 days thereafter in the Southern District of New York, *National Association for the Advancement of Colored People v. New York City Board of Elections*, 72 Civ. 1460.⁴ Counsel for appellants also informed the Department attorneys that the New York Advisory Committee to the United States Civil Rights Commission intended to hold hearings in April, 1972 regarding the new district lines in the three counties to assist the Commission in deciding whether to urge the Attorney General to object to those changes in New York law. During the same discussion with the Department of Justice, counsel for appellants learned for the first time of the pendency of the instant action and of New York's motion for summary judgment. On several occasions counsel for appellant was expressly assured by Justice Department attorneys that the United States would oppose any exemption for the three counties and was preparing papers in opposition to the motion for summary judgment. At no time did any representative of the Department, though fully aware of appellants' interest in this action, seek from appellants or their counsel, or indicate any interest in, information regarding the central issue in the instant case—whether New York's literacy tests had been used in the three counties over the previous decade with the purpose or effect of denying or abridging the right to vote on account of race or color.⁵

⁴ The complaint in that action is set out on pp. 52a-62a.

⁵ Affidavit of Eric Schnapper dated April 7, 1972, pp. 48a-51a.

On April 3, 1972, the Assistant Attorney General in charge of the Civil Rights Division executed a 4 page affidavit on behalf of the Attorney General stating that the United States had no reason to believe that literacy tests had been used in New York, Kings or Bronx counties in the previous 10 years with the purpose or effect of denying or abridging the right to vote on account of race or color, p. 44a. The affidavit was filed with the District Court for the District of Columbia the next day, together with a one sentence memorandum consenting to the entry of the declaratory judgment sought by New York, p. 40a. On the afternoon of April 5, 1972, counsel for appellants was notified by telephone of the Justice Department's reversal of its earlier position. Appellants moved to intervene as party defendants in the instant proceeding on April 7, 1972.

The United States did not oppose the motion to intervene. That motion was opposed, however, by New York.⁶

On April 13, 1972, the District Court denied without opinion appellant's motion to intervene and granted summary judgment in favor of plaintiff. On April 24, 1972, appellants moved the District Court to alter its judgment. That motion was denied without opinion on April 25, 1972. This appeal followed.⁷

Summary of Argument

I. At stake in the instant case is whether the protections of sections 4 and 5 of the Voting Rights Act will continue to apply to over 2 million blacks and Puerto

⁶ See Affidavit of John Proudfit, pp. 67a-70a.

⁷ By agreement of counsel no further action has been taken by either party in the New York action pending a final decision in the instant case.

Ricans in New York, Kings and Bronx counties, New York. The protections of those sections include the requirement that changes in election laws obtain federal approval before being implemented, and a continuing prohibition against the use of literacy tests after the national ban on such tests expires in 1975.

II. Section 4(a) of the Voting Rights Act, regarding litigation seeking an exemption from sections 4 and 5, provides expressly and without limitation "any appeal shall be to the Supreme Court". 42 U.S.C. §1973b(a). Because this provision refers to appeals generally rather than appeals by "parties", this Court need not decide whether an unsuccessful applicant for intervention is a party within the meaning of statutory provisions authorizing appeals by a "party". Compare 28 U.S.C. §1253. An unsuccessful applicant for intervention has a well established right to appeal the denial of intervention, and the recent practice of this Court has been to take jurisdiction over such appeals regardless of whether the applicant might prevail on appeal on the merits.

III. Congress expressly intended to place Kings, Bronx and New York counties under sections 4 and 5. Under the original 1965 Act states and subdivisions were subject to sections 4 and 5 if, as of 1964, they met certain criteria regarding voter registration and turnout and the use of literacy tests. When the 1965 Act came up for renewal, it was pointed out that certain areas, particularly these three counties, met the specified criteria in the 1968 election although they had not met them in 1964. Accordingly Senator Cooper proposed that sections 4 and 5 apply to states and subdivisions which met the criteria in either 1964 or 1968. The Cooper Amendment was passed by the Senate and the House, both of which were advised during the relevant debates that the Amendment would bring

under sections 4 and 5 Kings, Bronx, and New York Counties.

IV A. Applicants for intervention in this case have a substantial interest herein. First, these applicants are plaintiffs in a pending action in the Southern District of New York, *N.A.A.C.P. v. New York City Board of Elections*, in which they seek to compel the three counties to comply with the provisions of section 5 and submit the changes in legislative and congressional district lines in the counties for federal approval. Applicants New York litigation will necessarily fail if an exemption from sections 4 and 5 is granted to the counties in the instant case. Applicants herein—including blacks, Puerto Ricans, public officials, and a civil rights organization—also have a substantial interest in opposing the exemption because it will deprive them for all time of the protections of sections 4 and 5. Both this Court and appellees have recognized the inadequacies of applicants' rights under the Fifteenth Amendment if denied the special remedies of the Voting Rights Act.

IV B. The United States did not adequately represent applicants' interests in this case. The United States refused to offer any defense whatever to New York's claim for exemption—calling no witness, filing no document, briefing not a single legal issues in opposition to that claim. This capitulation is clearly inadequate representation within the meaning of Rule 24, Federal Rules of Civil Procedure. *Trbovich v. United Mine Workers*, 404 US 528, 538 (1972)

The cursory investigation lending to this capitulation was itself plainly inadequate. The United States did not inquire into either the facts or legal theories which the Senate considered before passing the Cooper Amendment. Nor did the United States bring to the attention of the

District Court any of the evidence or legal arguments weighing against the exemption which the Attorney General had earlier used in testimony on the Voting Rights Act and which the Solicitor had earlier employed in litigation under that statute.

IV. C. The motion to intervene was timely filed only 2 days after applicants learned that the United States had reversed its position and declined to defend this action. It is well established that a party need not seek to intervene until events reveal a need to do so to protect his interests. The contrary rule would flood the courts with protective motions for intervention, most of them unnecessary and none of them ripe for decision. In the instant case applicants had every reason to believe that the United States would protect their interests until the government announced that it would consent to the exemption.

IV D. Intervention should have been granted by the District Court to assist it in carrying out its responsibilities under the Voting Rights Act. Under section 4 an exemption may not be granted until and unless the District Court finds as a matter of fact that the jurisdiction involved had not within the last decade used its literacy test with the purpose or effect of denying or abridging the right to vote. In the instant case New York offered evidence that it had not applied its test in a discriminatory manner, and the United States offered no evidence at all. The District Court thus had no evidence whatever from the original parties regarding the problems which led to the Cooper Amendment—the purpose of New York's literacy test, the differences in literacy rates between whites and non-whites, inferior educational opportunities for non-whites of voting age in New York or their native state, the deterrent effect of literacy tests. Applicants offered the District Court extensive documentary evidence on several of these issues.

For the District Court to refuse to inform itself about these matters and to grant an exemption was clear error. The resolution of the merits of this case by the District Court fell far short of the careful scrutiny which Congress must have contemplated would be exercised before the elaborate protections of sections 4 and 5 were withdrawn from more than 2 million blacks and Puerto Ricans.

ARGUMENT

I.

Introduction.

At stake in this litigation is whether the protections of sections 4 and 5 of the Voting Rights Act will continue to apply to New York, Kings and Bronx Counties in the State of New York. As is set out *infra*, pp. 17-21, Congress amended the coverage formula or trigger of the Voting Rights Act in 1970 for the express purpose of applying sections 4 and 5 to those three counties. The counties have a total black population of 1.4 million and another 800,000 Puerto Ricans.⁸ The combined minority population of these counties is almost double that of the largest southern state covered by the Act. Kings County alone has nearly as many black residents as do the states of Virginia and South Carolina. Prior to the instant action, which threatens to withdraw the protections of the act from 2.2 million minority group members, the total number of minority group members affected by all previous exemptions combined was less than 100,000.

The protections afforded by sections 4 and 5 to blacks and Puerto Ricans in the three counties are of great im-

⁸ See Jurisdictional Statement, p. 16.

portance. Under these provisions all changes in the election laws and practices in the three counties cannot be put into operation unless approved by the Attorney General or sanctioned by the United States District Court for the District of Columbia. Congress only established this unusual procedure after concluding that private and government litigation under the Fifteenth Amendment and a variety of earlier civil rights statutes had proved inadequate to protect the rights involved. *South Carolina v. Katzenbach*, 383 U.S. 301, 309-315 (1966); *Allen v. Board of Elections*, 393 U.S. 544, 556 n.21 (1969). Under section 5 the burden of proof is shifted to the jurisdiction involved, and it must prove not only that the new law or practice have no discriminatory purpose, but also that the law or practice will not have the *effect* of denying or abridging the right to vote on account of race. In the instant case, for example, the NAACP objects to the recent redistricting in the three counties as discriminatory. Were the NAACP required to establish a constitutional violation, it would have to prove the new boundaries were "the product of a state contrivance to segregate on the basis of race," a practically insurmountable obstacle. Compare *Wright v. Rockefeller*, 376 U.S. 52, 58 (1964).⁹ Under section 5 the test which redistricting must meet is very different from that under *Wright*, and the difference is one of great practical importance to blacks or Puerto Ricans who believe their right to vote will be abridged by the new laws.

⁹ Justice Goldberg noted in his dissent in *Wright*, "To require a showing of racial motivation in the legislature would place an impossible burden on complainants. For example, in this case the redistricting bill was recommended and submitted to the legislature on November 9, 1961, passed on November 10, 1961, and signed by the Governor on that date. No public hearings were had on the bill and no statements by the bill's managers or published debates were available." 376 U.S. at 73-74.

In addition the national ban on literacy tests, and certain other tests and devices, will expire in two and one-half years on August 6, 1975. If New York obtains the exemption sought, it will thereafter be able to reinstate the application of literacy tests not only for new voters, but for previously registered voters as well. 42 U.S.C. §1973aa. However, if New York does not obtain the exemption sought in this action, the ban on literacy tests and other test devices will remain in effect at least until 1980 and probably indefinitely. 42 U.S.C. §1973b(a)¹⁰ The exemption would also deny blacks and Puerto Ricans their right to the appointment of Federal voting examiners under 42 U.S.C. §1973d(b).

¹⁰ Section 1973b(a) prohibits the use of literacy by any state or subdivision covered by section 4 and 5. Since an exemption may be obtained by proving that literacy tests have not been used with discriminatory purpose or effect in the last 10 years, New York would be able to obtain an exemption ten years after the date in 1970 when it ceased to use literacy tests at all. However, as the Attorney General himself has suggested, the very use of literacy tests in 1980 would have the effect of discriminating on the basis of race in view of the many blacks in the three counties who were illiterate because of inferior education in New York or elsewhere. Thus an exemption granted in 1980 would be immediately revoked for another decade as soon as New York attempted to use its literacy tests. Compare Hearings Before a Subcommittee of the House Judiciary Committee on H.R. 4249, 91st Cong., 1st and 2nd Sess. (1969), (hereinafter "House Hearings"), p. 222 (Testimony of Mr. Mitchell). The ban on literacy tests would presumably remain in effect, in the Attorney General's words, "for the foreseeable future," "until the adult population were composed of persons who had equal educational opportunities", *id.*

See also Hearings Before a Subcommittee of the Senate Judiciary Committee on S. 818 (1969-70), 91st Cong. 1st and 2nd Sess. (hereinafter "Senate Hearings"), pp. 185, 191 (Testimony of Attorney General Mitchell).

II.

The Court Has Jurisdiction Over This Case.

Section 1973b(a), section 4(a) of the Voting Rights Act, provides that an action brought to obtain an exemption from sections 4 and 5 of the Voting Rights Act shall be heard and determined by a court of three judges. That section states that such a three judge court shall be composed in accordance with 28 U.S.C. §2284. Section 1973b(a) further provides expressly and without limitation that "*any appeal shall lie to the Supreme Court.*" (Emphasis added) This provision is modeled after the appeal provision regarding government initiated anti-trust actions, and refers to appeals generally and not to appeals by "parties." Compare 15 U.S.C. §29.¹¹ It is well established that unsuccessful applicants for intervention may appeal directly to this Court from a denial of intervention in such anti-trust cases. *Sulphen Estates v. United States*, 342 U.S. 19, 20 (1951); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). Section 1973b(a) referring to "any appeal" is readily distinguishable from appeal statutes applicable to "any party." Compare 28 U.S.C. §1253.¹²

While Congress incorporated by reference the Judiciary Code's provisions regarding the method of establishment of certain three judge courts, 28 U.S.C. §2284, Congress

¹¹ "In every civil action brought in any district court of the United States under any of said [anti-trust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

¹² "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

declined to incorporate or even refer to the Code's provisions regarding appeals by "parties" from such courts, but wrote a more broadly worded section directing all appeals to this Court. The congressional desire for a prompt final adjudication of appeals in actions for exemptions under the Voting Rights Act is equally applicable whether that appeal is taken by a state, the United States, or a successful or unsuccessful applicant for intervention. Compare *Apache County v. United States*, 256 F. Supp. 903, 907 (D.D.C., 1966). Intervention or not under the circumstances of this case is no mere ancillary issue, but controls whether or not New York was properly awarded an exemption from sections 4 and 5 and thus falls well within the mainstream of issues which section 1973b was intended to cover. Accordingly the Court is not called upon to determine in this case whether an unsuccessful applicant for intervention is a "party" for purposes of appeal.¹³

¹³ Appellants would urge, were that question reached, that such an unsuccessful applicant must be treated as a party. In language paralleling section 1253, section 1254 limits petitions for writs of certiorari and appeals from state courts and courts of appeals to "any party." This Court has never doubted its jurisdiction over such petitions and appeals by unsuccessful applicants for intervention. See e.g. *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972). If an unsuccessful applicant for intervention is "any party" within the meaning of section 1254, he is also "any party" within that of section 1253. The Judiciary Code and the various Federal rules constantly refer to those taking part in litigation as parties, and were applicants for intervention not parties until and unless their applications were granted, most of the existing provisions regarding the procedures in the district courts, the courts of appeal, and this Court itself would be inapplicable. See e.g. 28 U.S.C. §1252, 1654, 2107, 2108; Federal Rules of Civil Procedure 5(a), 5(b), 5(c), 5(d), 6(e), 8(b), 8(c), 8(e) (2), 9(a), 10(a), 11, 12(a), 12(b), 12(c), 12(e), 12(f), 12(g), 13(a), 13(b), 13(c), 13(g), 15(a), 15(b), 12(c), 12(d), 17(a), 18(a), 19(a), 20(a), 20(b), 21, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 43(b), 46, 52(b), 60, 61, Federal Rules of Appellate Procedure, 2, 3(b), 3(c), 3(d), 4(a), 5(a), 5(b), 6(a), 6(b), 10(b), 10(d), 10(e), 11(b), 11(c), 11(e), 11(f), 11(g), 12(b), 13(a), 15(a), 15(e),

since applicants' direct appeal to this Court is clearly authorized by section 1973.

An unsuccessful applicant for intervention has an established right to appeal the denial of that application.¹⁴ The appeal lies regardless of whether the applicant asserted he was entitled to permissive or mandatory intervention.¹⁵ Where as here the appeal in the main proceeding goes directly to the Supreme Court, an appeal from an order denying intervention also goes directly to this Court.¹⁶

At one time this Court held that it only had jurisdiction in a case such as this if intervention were erroneously denied below, thus postponing a decision on jurisdiction until and resting it upon the resolution of the merits of the case. See e.g. *Fox Publishing Co. v. United States*, 366 U.S. 683, 687-8 (1961). That the denial of intervention in the instant case was improper is detailed infra, pp. 22-41, and this Court's jurisdiction is thus clear. The procedure

15(d), 16(b), 17(b), 18, 21(b), 24(a), 24(b), 24(c), 25(b), 26(c), 27(a), 27(b), 28(b), 29, 31(b), 32(a), 33, 34(a), 34(b), 34(d), 35(b), 35(c), 36, 39(c), 42(b), 43(a), 43(b), 43(c), 44, Rules of the Supreme Court 10(2), 10(4), 12(1), 12(4), 14(1), 16(5), 21(1), 21(3), 21(5), 21(6), 24(5), 26, 29(3), 33(1), 33(2), 33(3), 34(2), 34(3), 34(4), 34(5), 35(2), 35(4), 36(2), 36(3), 36(4), 36(5), 40(2), 41(5), 42(2), 42(3), 45(1), 45(3), 46, 48(1), 48(2), 48(3), 48(4), 50(2), 50(5), 53(1), 53(2), 59, 60(1), 60(3), 60(4).

¹⁴ Whether an applicant can take an interlocutory appeal from that denial or must await final judgment is a matter of some dispute. 3B Moore's Federal Practice ¶24.15. In the instant case that issue need not be resolved, since the denial of the motion to intervene and the final judgment were contained in the same order.

¹⁵ *Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), *Brotherhood of RR Trainmen v. Baltimore & Ohio RR*, 331 U.S. 519 (1947).

¹⁶ *United States v. California Coop. Canneries*, 279 U.S. 553 (1929); *Allen Calculators, Inc. v. National Cash Registers*, 322 U.S. 137 (1944); *Fox Publishing Co. v. United States*, 366 U.S. 683 (1961).

followed in *Fox Publishing* has been criticized, 7A *Wright and Miller, Federal Practice and Procedure*, §1923, and was apparently abandoned by this Court in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), an appeal from a denial of intervention where the Court noted probable jurisdiction rather than postponing jurisdiction pending a resolution of the merits. 382 U.S. 970 (1966). Similarly in *Syufy Enterprises v. United States*, 404 U.S. 802 (1971), the Court affirmed the denial of intervention below rather than dismissing the appeal for want of jurisdiction. Federal appeals courts in seven of the circuits have assumed that they have jurisdiction to hear an appeal from a denial of intervention regardless of whether that denial was proper. Where the denial of intervention was correct, these courts have affirmed the judgment below rather than dismissing the appeal.¹⁷ The practical consequences are the same whether or not the practice in *Fox Publishing* is followed, for an unsuccessful applicant for intervention can only prevail on appeal by showing that the denial of intervention below was erroneous.¹⁸

¹⁷ *FMC Corp. v. Keizer Equip. Co.*, 433 F.2d 654 (6th Cir. 1970); *Bumgarner v. Ute Indian Tribe*, 417 F.2d 1305, 1309 (10th Cir. 1969); *Martin v. Kalvar Corp.*, 411 F.2d 552, 553 (5th Cir. 1959); *Edmondson v. State of Nebraska*, 383 F.2d 123, 128 (8th Cir., 1967); *Union Cent. Life Ins. Co. v. Hamilton Steel Prods., Inc.*, 374 F.2d 820, 824 (7th Cir., 1967); *Reich v. Webb*, 336 F.2d 153, 160 (9th Cir., 1964), cert. den. 380 U.S. 915; *Philadelphia Elec. Co. v. Westinghouse Elec. Corp.*, 308 F.2d 856, 861 (3d Cir., 1962), cert. den. 372 U.S. 936.

¹⁸ If, however, this Court were to conclude that the appeal in this case should have been to the Court of Appeals for the District of Columbia, it should vacate the judgment below and remand the case to the district court so that it may enter a fresh decree from which a timely appeal may be taken to the Court of Appeals. Compare *Phillips v. United States*, 312 U.S. 246, 254 (1941); *Pennsylvania Public Utility Commission v. Pennsylvania Railroad Co.*, 382 U.S. 281, 282 (1965); *Wilson v. City of Port Lavaca*, 391 U.S. 352 (1968).

III.

Congress Expressly Intended to Place Kings, Bronx and New York Counties Under Sections 4 and 5 of the Voting Rights Act.

Under the 1965 Voting Rights Act as originally enacted the requirements of sections 4 and 5 were applied to any state or subdivision which met two criteria: (1) on November 1, 1964, it had in effect a test or device as defined in section 4(c), 42 U.S.C. §1973b(c), such as a literacy test, and (2) less than 50 percent of the voting age population was registered on November 1, 1964, or less than 50 percent of such persons voted in the 1964 presidential election. Most of the covered areas were located in the south; Alabama, Louisiana, Mississippi, Georgia, South Carolina, Virginia, and 40 counties of North Carolina were subjected to the clearance procedures. In the north 6 scattered counties and the state of Alaska were also covered. Between the enactment of the 1965 Act and the 1970 amendments only one county in the South was able to obtain an exemption; in the north, however, Alaska and at least 4 of the affected counties obtained, with the concurrence of the Attorney General, declaratory judgments exempting them from sections 4 and 5. See 116 Cong. Rec. 5526, 6521, 6621, 6654 (1970).

Sections 4 and 5 of the 1965 Act were so framed as to automatically expire in 1970. Extension of these provisions was proposed for a period of 5 years until 1975, but both the Administration and many members of Congress opposed any such extension. The principal criticism voiced by these opponents and recurring throughout the history of the 1970 amendments was that sections 4 and 5 applied almost exclusively to the South, and constituted discrimina-

tory regional legislation. Renewal of the sections was initially rejected by the House on this ground.¹⁹ When the measure was considered by the Senate, the same argument was advanced.²⁰ Critics of sections 4 and 5 reiterated that discrimination was a national problem and could be found even in the city of New York.²¹ In particular it was repeatedly pointed out that New York, Kings and Bronx Counties, which did not fall under the 1965 Act, would have been covered by sections 4 and 5 of the Act if the formula contained therein had referred to registration and voting turnout in November 1968 instead of November 1964.²²

In response to these arguments Senator Cook proposed that sections 4 and 5 be altered so as to cover states and subdivisions which had the specified tests or devices and low registration or presidential vote in *either* 1964 or 1968. Senator Cooper explained his amendment in the following terms:

The pending amendment would bring under coverage of the Voting Rights Act of 1965, and under the triggering device described in section 4(b), those States or political subdivisions which the Attorney General may determine as of November 1, 1968, employed a test or device and where less than 50 percent of persons of voting age were registered or less than 50 percent of such persons voted in the presidential election of 1968.

• • •

¹⁹ 115 Cong. Rec. 38485-38537 (1969).

²⁰ See generally 116 Cong. Rec. 5516-6661 (1970).

²¹ 116 Cong. Rec. 5534 (Remarks of Senator Hansen), 5670 (Remarks of Senator Byrd), 5687-8 (Remarks of Senator Long), 6158 (Remarks of Senator Gurney), 6161-63 (Remarks of Senator Ellender) (1970), 6621-22 (Remarks of Senator Long).

²² 116 Cong. Rec. 5546 (Remarks of Senator Ervin), 6151-52 (Remarks of Senator Ellender), 6623-25 (Remarks of Senator Allen) (1970).

One of its purposes is to establish the principle that the Voting Rights Act of 1965 and, in particular, its formula, section 4(b), which is called the trigger, is applicable to all States and political subdivisions and is not restricted to the Southern States.

. . .

The amendment also establishes the principle which has been approved in our debate—that legislation to secure the voting rights must apply to all the people of this country, and to all the States. It is not restricted to a fixed date in the past, whether 1964 or 1968. It is a continuing effort to secure and assure voting rights to all the people of our country.

. . .

The chief State involved is the State of . . . New York. Three counties of New York were involved, Bronx, Kings, and New York. In the 1964 election more than 50 percent of the voters were registered and more than 50 percent voted. However, for some reason in the 1968 election 50 percent were not registered or voting. 116 Cong. Rec. 6654, 6659 (1970).

Although opposed by the Senators from New York, the Cooper amendment was passed with the support of Senators from all regions of the country. 116 Cong. Rec. 6661. When the Senate bill was brought up for consideration in the House, both the Chairman of the Judiciary Committee and the Majority Leader noted that the new version applied to New York, Kings and Bronx counties, the latter noting that this change demonstrated that the Act was not "aimed at any one section."²² The House, which had earlier re-

²² 116 Cong. Rec. 20161 (Remarks of Rep. Celler), 20165 (Remarks of Rep. Albert) (1970).

jected renewal of sections 4 and 5, acquiesced in their re-enactment as thus modified.²⁴

The Senate debates leading to the passage of the Cooper amendment reveal a variety of concerns as to the manner in which New York's literacy test had had a discriminatory purpose or effect in the three counties involved. (1) Senator Cooper, referring to this Court's decision in *Katzbach v. Morgan*, 384 U.S. 641, 654 n.14 (1966), urged that New York's 1922 literacy requirement was enacted, with the purpose of discriminating on the basis of race.²⁵ (2) Senator Griffin argued that if New York denied the vote to illiterate black applicants who had received an inferior education in a segregated southern school system, the literacy test would have the effect of discrimination on the basis of race in a manner which this Court had earlier held to constitute the type of discrimination which precludes an exemption from sections 4 and 5.²⁶ (3) Senator Hruska, quoting testimony by the Attorney General, suggested it would also discriminate on the basis of race to deny the franchise to illiterates who had received an inferior education in the north, without regard to whether a de jure dual school system might be involved.²⁷ (4) Again quoting the Attorney General, Senator Hruska suggested that the mere use of literacy tests had a psychological effect which tended to deter blacks who might seek to register and thus have a racially discriminatory effect.²⁸ (5) Several Senators sug-

²⁴ 116 Cong. Rec. 20199 (1970).

²⁵ 116 Cong. Rec. 6660 (1970); see also 116 Cong. Rec. 6659 (Remarks of Senator Murphy).

²⁶ 116 Cong. Rec. 6661; see also 116 Cong. Rec. 5533 (Remarks of Senator Hruska), 6158-9 (Remarks of Senators Dole and Mitchell) (1970); *Gaston County v. United States*, 395 U.S. 285 (1969).

²⁷ 116 Cong. Rec. 5533 (1970).

²⁸ 116 Cong. Rec. 5533; see also 116 Cong. Rec. 6152 (Remarks of Senator Eastland) (1970).

gested that literacy tests were discriminatory in effect merely because the rate of illiteracy was higher among blacks or other minorities than among whites.²⁹

The requested exemption of Bronx, Kings and New York counties amounts, for all practical purposes, to a repeal of the Cooper amendment. Neither the Department of Justice nor the courts, not to mention the state of New York, have a general warrant to revoke Congressional decisions with which they may not happen to agree. Such an exemption for the three counties should only have been considered after it was conclusively proved that each of the five legal and factual theories which led Congress to enact the Cooper amendment was without rational foundation. In fact, however, the record in this case reveals that New York offered neither factual evidence nor legal argument relevant to the congressional concerns behind the Cooper amendment, and that the United States in its abortive investigation pursued not a single one of five theories on which congress had acted and some of which, as will be seen, had been advanced by the Attorney General himself.³⁰

²⁹ 116 Cong. Rec. 5532-3) (Remarks of Senator Hruska), 6152 (Remarks of Senator Eastland), 6156 (Remarks of Senator Gurney) (1970).

³⁰ See pp. 30-36, *infra*.

IV.

The District Court Erred In Denying the Motion to Intervene.**A. Applicants Have a Substantial Interest In the Continued Applicability of Sections 4 and 5 to Kings, Bronx and New York Counties.**

Rule 24(a) provides, inter alia, that an applicant may intervene as of right if he "claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. . . ."

The record in the instant case demonstrates that the NAACP and others seeking intervention have two interests in the instant litigation, either of which would be sufficient to give rise to a right to intervene. First, the applicants for intervention in this case are the plaintiffs in a pending action in the United States District Court for the Southern District of New York to compel New York to comply with section 5. In that action, *N.A.A.C.P. v. New York City Board of Elections*, 72 Civ. 1460, the NAACP and other plaintiffs alleged that New York was implementing changes in its legislative and congressional district lines in violation of the Voting Rights Act, and sought an injunction to prevent any implementation of the new redistricting laws until and unless New York obtained approval of those changes in its election laws from either the Attorney General or the district court for the District of Columbia.³¹ The record also demonstrates that, once

³¹ Complaint in *NAACP v. New York City Board of Elections*, pp. 52a-62a. The Congress which enacted the Cooper Amendment was of course aware that section 5 had been applied by the courts to redistricting. See Senate Hearings, p. 507 (Testimony of Mr. Norman).

New York has been compelled to submit its redistricting for approval, the NAACP intended to vigorously oppose such approval.³² This litigation, which was pending in the Southern District of New York when the NAACP and others moved to intervene, must of necessity fail if an exemption is granted in the instant case.³³ The NAACP cannot enforce in the New York action the general obligation of the three counties to comply with sections 4 and 5 if the District Court in the instant case grants those counties an exemption from that very obligation. Not only does an exemption in this case sound the death knell of the New York action, but under the Voting Rights Act the NAACP and other applicants can only oppose the exemption by intervening in the instant case. A more compelling case for intervention as of right is difficult to imagine.

Applicants also are entitled to intervene as of right to protect their more general interest in retaining the safeguards of sections 4 and 5, with regard to all future changes in election laws, not merely those involving redistricting, as well as attempts to reintroduce literacy and other tests.³⁴ Applicant NAACP is an organization formed to protect the legal, social, economic and political rights and interests of black Americans, and seeks to oppose the instant exemption on behalf of its self, its constituent branches, all of its members, and all other black residents of New York, Bronx, and Kings counties. The individual appellants, black and Puerto Rican, several of them elected public officials, are all residents of the three counties.

³² Affidavit of Eric Schnapper, dated April 7, 1972, p. 49a.

³³ In recognition of this fact, counsel in the New York action have agreed to take no further action therein pending a final decision in the instant case.

³⁴ Those protections, absent an exemption, would remain in effect at least until 1980 and probably indefinitely. See p. 12, *supra*.

Each of these applicants for intervention will lose the various protections of sections 4 and 5 if the exemption sought by New York is granted. This Court has already held that ["i]t is consistent with the broad purpose of the [Voting Rights] Act to allow the individual citizen standing to insure that his city or county government complies with § 5 approval requirements." *Allen v. Board of Elections*, 393 U.S. 544, 557 (1969). The interest of such an individual citizen is all the greater when his county government seeks to avoiding complying with section 5's requirements not merely in a particular case, but for all time. There is only one way in which an individual can protect that interest when an exemption is sought by his county and acquiesced in by the Attorney General—by intervening in the action seeking the exemption. The Voting Rights Act provides no other forum in which the NAACP and other applicants could have vindicated their interest in the continuing application of sections 4 and 5.³²

The United States and New York urge that applicants will still be able to seek relief for violations of their Fourteenth and Fifteenth Amendment rights even if an exemption is granted.³³ But, as this Court has repeatedly recognized, the Voting Rights Act was enacted with the express purpose of augmenting the remedies available to blacks and other minority groups because Congress had concluded, after extensive inquiry, that suits under these

³² Permitting intervention would be consistent with the recognized trend towards enlarging the class of people who may protest administrative action. *Data Processing Service v. Camp*, 397 U.S. 150, 154 (1970). If the Voting Rights Act had authorized the Attorney General himself to grant exemptions, there would be little doubt that the applicants herein would have standing to challenge such a decision.

³³ Motion of United States to Dismiss or Affirm, pp. 5-6; Motion of New York to Dismiss or Affirm, pp. 7-8.

Amendments had proved inadequate. *South Carolina v. Katzenbach*, 383 U.S. 301, 309-315 (1966); *Allen v. Board of Elections*, 393 U.S. 544, 556 n.21 (1969). In its brief before this Court in *Katzenbach* the United States argued:

[T]he remedies available under law to citizens thus denied their constitutional rights—and the authority presently available to the Federal Government to act in their behalf—are clearly inadequate. . . .

The . . . hearings and debates developed abundant evidence that, notwithstanding intensive litigation under the voting rights provisions of the Civil Rights Acts of 1957, 1960 and 1964, the promise of the Fifteenth Amendment remained largely unfulfilled. . . .²⁷

In an amicus brief in the same case, the Attorney General of New York urged,

After it became overwhelmingly clear that existing remedies, no matter how vigorously pursued, were inadequate, Congress had no alternative but to frame new legislation to cope with the situation.²⁸

²⁷ Brief of plaintiff in No. 22 Original, October 1965 Term, p. 70.

²⁸ Brief of the attorneys general of Massachusetts, New York, and other states, amicus curiae, in No. 22 Original, October 1965 Term, p. 3. During the hearings on the 1970 Act, it was proposed that sections 4 and 5 requirement of prior submission of new election laws be repealed.

Senator Bayh: This would greatly increase the burden that an individual must prove. Under the present act, under the present section 5, an individual need only present to the court evidence that that legislature did not approach you as Attorney General before this act was implemented. This would not be the case now. They would have to prove the discrimination. . . .

Attorney General Mitchell: This is true, and this is the issue that I raise.

Only four years ago the United States urged this Court, in view of the additional rights conferred by the Act, that private litigants should be allowed to seek declaratory and injunctive relief to enforce the statute, even in the absence of express authorization of such actions. *Allen v. Board of Elections*, 393 U.S. at 557, n.23. That argument led this Court to conclude in *Allen* that "[t]he guarantee of §5, that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to §5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." 393 U.S. at 557. If, as the United States claimed in *Allen*, private individuals were entitled to force Mississippi and Virginia to comply with section 5 in a particular case, those citizens surely would have an even greater interest in preventing Mississippi or Virginia from avoiding compliance in all cases by obtaining an unopposed exemption. No different rule can apply to those three counties of New York."

B. The United States Did Not Adequately Represent Applicants' Interests.

That the United States does not adequately represent applicants' interests can hardly be disputed. The requirement of Rule 24 is satisfied merely on a showing that the representation of applicants' interests "may be" inadequate. The burden of making that showing is minimal. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

The United States has refused without qualification to present any defense to the instant action. The government

³³ In addition to erroneously denying intervention as of right, the District Court abused its discretion in refusing to grant permissive intervention under Rule 24(b) to obtain evidence necessary for that court to carry out its statutory responsibilities under the Voting Rights Act. See *Apache County v. United States*, 256 F.Supp. 903, 908 (D.D.C. 1966), pp. 42-50, *infra*.

has declined to call a single witness, to submit a single document, or to brief a single issue in opposition to New York's claim for an exemption. Intervention would lead to no disagreement as to how to conduct the defense since the United States has no defense to offer. In the district court the United States did not claim it adequately represented the interests of the NAACP or other applicants or otherwise oppose the motion to intervene. The United States did not even ask the District Court to retain jurisdiction over this case for the next five years, although this precautionary measure is mandatory under section 4, 42 U.S.C. § 1973b(a).

The capitulation of the United States in the instant case amounts to a complete failure to represent the interests of the applicants for intervention. Compare *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 155-6 (1967) (dissent of Justice Stewart); *Stadin v. Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir., 1962), *certiorari denied* 373 U.S. 915. The mere possibility that the United States would decline to contest this action would be sufficient to warrant intervention. Compare *Klein v. Nu-Way Shoe Co.*, 136 F.2d 986, 989 (2nd Cir., 1943). Here the danger that the government will not contest the action is not mere possibility, it is a certainty. In an action such as this under the Voting Rights Act the only role accorded the United States is to present evidence and legal argument to the district court; the government cannot settle or compromise the case, for an exemption can be granted if and only if the court makes certain findings of fact. Thus where the United States refuses to offer any such evidence or argument, its representation of the interests of the minority groups affected is inadequate per se.

The affidavit submitted by the United States below, pp. 40a-43a, acquiescing to the exemption for the three

counties, reveals an incomprehensible failure by the Department of Justice to pursue the legal and factual concerns which led to the passage of the Cooper amendment. The Department of Justice made no inquiry as to whether New York's literacy requirement was enacted with the purpose of discriminating on the basis of race. Compare remarks of Senator Cooper, *supra* note 25. The Department of Justice made no inquiry as to whether the rate of illiteracy was higher among blacks and Puerto Ricans than among native whites. Compare remarks of Senators Hruska, Eastland and Gurney, *supra* note 29. The Department of Justice made no inquiry into whether the three counties provided non-whites with an inferior education resulting in a higher rate of illiteracy. See remarks of Senator Hruska, *supra* note 27. The Department of Justice made no inquiry into whether there were non-whites of voting age in the three counties who had migrated there after receiving an inferior segregated education in the South. See remarks of Senator Griffin, *supra* note 26. The Department of Justice made no inquiry into whether the use of literacy tests had deterred blacks and Puerto Ricans from even attempting to register to vote. See remarks of Senator Hruska, *supra* note 28.

The investigation conducted by the Department "consisted of examination of registration records in selected precincts in each covered county, interviews of certain election and registration officials and interviews of persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties." (p. 40a.) So far as appears from the government's papers, its investigators may never have interviewed any person not interested in obtaining the exemption or even any black or Puerto Rican. None of the appellants or their counsel, all of them known to be vitally interested in this case, were ever interviewed

or even informed by the Justice Department that any investigation was underway. An examination of the registration records was well calculated to reveal nothing other than clumsily concealed discrimination in the application of the literacy tests, and the legislative history of the Cooper amendment reveals that that was one of the few types of discrimination Congress did *not* consider. The results of this investigation were predictably barren. Beside detailing the extent to which election officials had failed at first to comply with the 1965 federal ban on English language literacy tests to deny the vote to Puerto Ricans with at least a sixth grade education, and with the 1970 federal prohibition against all literacy tests, the affidavit lamely recites that the interviews with election officials and other unnamed knowledgeable persons "revealed no allegation by black citizens that the previously enforced literacy test was used to deny or abridge their right to register and vote by reason of race or color." (p. 41a.)⁴⁰

The failure of the Department of Justice to investigate any type of discrimination other than purposeful misapplication of literacy tests is all the more inexplicable and unjustifiable because the investigations and theories deliberately not pursued had been repeatedly advocated by the Attorney General before Congress and by the Solicitor General before this Court in the years immediately preceding this action.

⁴⁰ Compare the following dialogue in the House Hearings, p. 230.

The Chairman: So far as you know, no civil rights groups or individuals have brought suits in those areas [the northern states] and hardly any complaints have been filed in those areas as to irregularities? Is that the situation?

Attorney General Mitchell: Mr. Chairman, the fact that we have received few complaints does not necessarily establish the fact that there are not inequalities in the application of the literacy tests.

(1) During the 1970 Senate hearings on renewal of the Voting Rights Act the Attorney General maintained that the general purpose of literacy tests was to discriminate against unpopular segments of society.

The history of the literacy test in this country shows quite clearly that it was originally designed to limit voting by foreign-born and other minority groups.⁴¹

Two years ago the Solicitor took much the same position in this Court:

The history of literacy requirements also puts the notion that the purpose of the requirements was to assure an intelligent electorate in serious doubt.

As a memorandum of the Commission on Civil Rights pointed out, even outside the South, "a primary motivation behind [literacy] requirements" was to render politically impotent various racial, ethnic . . . [and] religious . . . groups." See Voting Rights Hearings [Senate Hearings] pp. 413-414. See also *id.* at pp. 185-188 (Attorney General Mitchell); *Katzenbach v. Morgan*, *supra* 384 U.S. at 654, *Castro v. State*; 85 Cal.Rptr. 20, 466 P.2d 244, 248-249; Leibowitz, "English Literacy: Legal Sanction for Discrimination", 45 Notre Dame Law 7 (1969).⁴²

The portion of *Katzenbach v. Morgan* referred to by the Solicitor, quotes the following remark by the sponsor of New York's literacy test:

More precious even than the forms of government are the mental qualities of our race. While those stand

⁴¹ Senate Hearings, p. 185. The Attorney General cited this Court's decision in *Katzenbach v. Morgan*, which dealt in particular with the origin of New York's literacy test. See pp. 30-31, *infra*.

⁴² Brief of plaintiff in *United States v. Arizona*, No. 46 Orig, October 1970 Term, pp. 49-50, n.47.

unimpaired, all is safe. They are exposed to a single danger, and that is that by constantly changing our voting citizenship through the wholesale, but valuable and necessary infusion of Southern and Eastern Europe races. . . . The danger has begun . . . We should check it." 384 U.S. at 654.

That statement and other matters led this Court to conclude there was at least "some evidence suggesting that prejudice played a prominent rôle in the enactment of [New York's literacy] requirement", *id.* Yet the Department of Justice failed to bring any of this evidence to the attention of the District Court or to try to develop additional evidence along these lines.

(2) In *Gaston County v. United States*, 395 U.S. 285 (1969), the United States maintained, and this Court agreed, that a literary test discriminated in effect on the basis of race within the meaning of section 4 of the Voting Rights Act if it were applied to non-whites who had a higher rate of illiteracy than whites due to the inferior education accorded them by the jurisdiction involved. The Solicitor urged in that case:

"New York has submitted 5 affidavits from employees of the New York City Board of Elections stating that New York's literacy test was not used with the purpose of denying or abridging the right to vote on account of race. Affidavit of Alexander Bassett, p. 16a; Affidavit of Winsor A. Lott, p. 20a; Affidavit of Darby M. Gaudia, p. 24a; Affidavit of Beatrice Berger, p. 27a; Affidavit of Gus Gall, p. 30a. The New York City Board of Elections is also the defendant in appellants' New York action connected with this case. In 1966, while New York was still applying its literacy tests, the New York City Board of Elections maintained in its brief in *Katzenbach* that "the New York State constitutional provision (Art. II, §1) disenfranchising all citizens 'unable to read and write English' was expressly intended to effect discrimination against certain nationalities and races based on hostility to those nationalities and races." Brief of appellant in *New York City Board of Elections v. Morgan*, October 1965 Term No. 877, p. 22.

The Voting Rights Act is result oriented; its aim is to broaden the degree of Negro-citizen participation in the electoral process of the covered jurisdictions. It is directed at both the unequal administration of literacy tests and at the fact that such tests were designed to capitalize on the inferior education afforded Negroes now of voting age. If, by reason of lesser opportunities leading to levels of educational attainment below or only bordering on literacy . . . the test has had a greater impact on Negro registration than white registration, the County is not entitled to removal from the Act's coverage. . . . The phrasing of the provision, particularly the use of the words "effect" and "abridging," makes clear that a covered jurisdiction cannot escape Section 4's reach simply by showing the absence of deliberate discrimination during the pertinent five-year period."

The Department was under no misapprehension that unequal educational opportunities occurred only in the South. Attorney General Mitchell testified during hearings on the 1970 Act that "inferior education for minority groups is not limited to any one section of the country."⁴⁴ In that same year the Solicitor pointed out to this Court that in New York the proportion of blacks with less than four years of schooling, the practical equivalent of illiteracy, was substantially higher than the comparable rate among

⁴⁴ Brief of appellant in No. 701, October 1968 Term, pp. 15-16, 19-20. Even earlier, in *South Carolina v. Katzenbach*, Orig. No. 22, 1965 Term, the Solicitor had maintained with regard to the states covered by the Act, "[I]n light of educational differences attributable to the public policies of the states involved, even a nondiscriminatory application of the tests would abridge Fifteenth Amendment rights." Brief of defendant, pp. 51, 65-68.

⁴⁵ House Hearings, p. 224.

whites." Yet the Department of Justice failed to bring any of this information to the attention of the District Court or to try to develop additional evidence along these lines.

(3) The Department of Justice has heretofore consistently maintained that, under *Gaston County*, a jurisdiction discriminates in the use of its literacy tests if it applies those tests to non-whites who received an inferior education in another jurisdiction. Attorney General Mitchell testified in the 1970 hearings on the Voting Rights Act

I believe that the *Gaston County* case . . . would bar the imposition of new literacy tests in those areas outside of the seven States covered by the 1965 act where publicly proclaimed school segregation was prevalent prior to 1954. This would include all or part of Florida, Arkansas, Texas, Missouri, Maryland, the District of Columbia, Kentucky and Tennessee. . . .

Many Negroes, who received inferior educations in these States, have moved all over the Nation. The Bureau of the Census estimates that between 1940 and 1968, net migration of nonwhites from the South totaled more than 4 million persons. . . .

Thus, following the Supreme Court's reasoning, it would appear inequitable for a State to administer a literacy test to such a person because he would still be under the educational disadvantage offered in a State which had legal segregation.

The thrust of my statement was to the effect that the Negroes who have migrated to northern cities, particularly New York, do not have the educational qualifications to pass literacy tests. . . .

"Brief of plaintiff in United States v. Arizona, October 1970 Term No. 46 Orig., p. 45 n.41.

[W]e firmly believe that the principle of the *Gaston County* case may very well be extended beyond the seven Southern States that are currently under the inhibitions of the 1965 Act because we believe that it can be argued that it is equally applicable in the other States that have literacy tests where it can be shown that the proposed voter was discriminated against in his education either in the northern or the western schools in the States where the literacy tests exist, or more directly perhaps the fact that he is a transient from the Southern States where they had unequal education and where, through that process, he is denied the equal protection of the literacy test laws even though he may be voting in the State that did not provide him with the education.⁴⁷

In his brief in *United States v. Arizona*, the Solicitor read this Court's decision in *Gaston County* to apply where persons received an inferior education in one jurisdiction and were then subjected to a literacy test in another:

The Court further indicated that it was immaterial where the educational "inequities" arose, although it was assumed that most of the adult residents of Gaston County had been educated there, "[i]t would seem a matter of no legal significance that they may have been educated in other counties or States also maintaining segregated and unequal school systems."⁴⁸

The Solicitor also pointed out to the Court census data showing substantial migration from the South to New York. *Id.* at 44 n.36. Yet the Department of Justice failed

⁴⁷ House Hearings pp. 222-4, 228, 285. See also Senate Hearings, pp. 207-08, 243, 504, 512, 663.

⁴⁸ Brief of plaintiff in No. 46 Orig., October 1970 Term, pp. 41-42.

to bring any of this information to the attention of the District Court or to try to develop additional evidence along these lines.

(4) Throughout his testimony on the 1970 Voting Rights Act the Attorney General repeatedly maintained that literacy tests such as those in New York deterred blacks from attempting to register to vote.

Little more than one-third of the voting-age Negro population cast 1968 ballots in Manhattan, the Bronx, or Brooklyn, New York City, and this amounted to only one-half the local white turnout....

[T]hese facts might well support the conclusion that literacy tests in a State like New York do discourage persons from voting since the ratios of Negro registration are higher in the South....

In many instances [Negroes] do not even apply to take those tests because of their educational deficiencies.

I believe the literacy test is an unreasonable physical obstruction to voting even if it is administered in an evenhanded manner. It unrealistically denies the franchise to those who have no schooling. It unfairly denies the franchise to those who have been denied an equal educational opportunity because of inferior schools in the North and South.

But, perhaps most importantly, it is a psychological obstruction in the minds of many of our minority citizens. I don't have all the answers. But I suggest to this committee that it is the psychological barrier of the literacy test—long associated with the poll tax as a discriminatory toll to keep the Negro from the ballot box—that may be responsible for much of the low Negro voter registration in some of our major cities. . . .

[T]his is a psychological barrier for people without education, the fact that they have to take literacy tests. It keeps them from going to the polls where they would have to take a literacy test in order to comply with the State statutes if they don't have a sufficient educational basis. . . .

[I]t is clear that Negro voting in most Deep South Counties subject to both literacy test suspension and on-scene enrollment by Federal registrars is now *higher* than Negro vote participation in the ghettos of the two Northern cities—New York and Los Angeles—where literacy tests are still in use. In non-literacy test Northern jurisdictions like Chicago, Cleveland and Philadelphia, Negro registration and voting ratios are higher than in Los Angeles and (especially) New York. . . .

In 1968 the two congressional districts in the nation with the lowest turnout were not in the Deep South; they were in the heart of New York's black, literacy-test handicapped ghetto. The two districts were the 12th (Bedford-Stuyvesant)⁴⁸ and the 18th (Harlem).⁴⁹

Yet the Department of Justice failed to bring any of this information to the attention of the District Court or to try to develop additional evidence along these lines.

C. The Motion to Intervene Was Timely.

Rule 24 requires that an application to intervene, whether the intervention sought is permissive or of right, must be timely.

⁴⁸ In Kings County.

⁴⁹ In New York County. House Hearings, pp. 227, 278, 296-7. See also Senate Hearings, p. 187.

The relevant facts were undisputed before the District Court. The amended provisions of the Voting Rights Act, including the Cooper amendment, was signed into law on June 22, 1970. Although it was known prior to enactment that sections 4 and 5 of the Act as modified covered the three counties of New York, the Attorney General did not formally issue the required determination of coverage until nine months later, March 27, 1971. 36 Fed. Reg. 5809.⁵¹ Yet another eight months passed until on December 3, 1971, when New York finally brought this action to exempt the three counties from coverage by sections 4 and 5. Still another three months passed with the express consent of the plaintiff until, on March 10, 1972, the United States filed its answer. New York moved for summary judgment on March 17, 1972.

Counsel was first engaged by applicants in the middle of March, 1972, to protect their rights under sections 4 and 5 of the Act by compelling New York to submit to the Department of Justice for its approval the state's newly enacted legislative redistricting statutes. Counsel for the NAACP was first advised of the pendency of this action on March 21, 1972, during a telephone discussion with an attorney at the Department of Justice. On that occasion, and on March 23, 29 and April 3, three different Justice Department attorneys assured counsel for the NAACP that the United States would oppose New York's motion for summary judgment.⁵² Counsel advised the Depart-

⁵¹ In sharp though inexplicable contrast, when the 1965 Act was enacted on August 5, 1965, the Attorney General formally issued the required determinations with regard to several southern states *one day* later. 30 Fed. Reg. 9897 (August 6, 1965).

⁵² Affidavit of Eric Schnapper, April 7, 1972, p. 48a. This affidavit was filed in support of the motion to intervene. The United States neither opposed the motion to intervene nor objected in any way to the contents of the affidavit. *Five months later*, for

ment, as requested by the Department's regulations, 36 Fed. Reg. 18189, that the NAACP planned to bring suit to prevent New York from implementing its redistricting without the requisite approval. Counsel discussed with Justice Department attorneys the nature of the objections to the redistricting which the NAACP contemplated filing with the Department when New York finally submitted its new election laws for approval. Counsel also advised the Department that the United States Civil Rights Commission planned to hold hearings on April 19, 1972 to enable it to decide whether it too would oppose the new district lines when they were submitted to the Justice Department. At no time did any Department representative indicate in any way that the litigation, objections or hearings might soon be rendered pointless by the government's action in the instant case.⁵³

On April 4 the United States filed a one sentence memorandum in the District Court consenting to the entry of a declaratory judgment exempting the three New York Counties from the Voting Rights Act.⁵⁴ On April 5 counsel for the NAACP and other applicants was informed of this action by a telephone call from an attorney at the Department of Justice. On April 6 counsel was advised by the law clerk to one of the members of the panel that any

the first time in this litigation, the United States informally stated in its Motion to Dismiss or Affirm that it is its position that the affidavit is not "an accurate representation of the conversations between counsel for appellants and attorneys for the government." The United States explains neither why it did not so inform the District Court in April, nor in what respect it now alleges the affidavit was inaccurate. This Court sits to review the decisions of the lower federal courts based upon the record before those courts, not to afford any party a second chance to present evidence which it failed to give to the courts below.

⁵³ See affidavits of Eric Schnapper, April 7, 1972 and April 24, 1972, pp. 48a and 91a.

⁵⁴ Appendix, p. 39a.

motion to intervene should be filed, with all supporting papers, on the next day.⁵⁵ On April 7 the instant motion to intervene was filed in the District Court.

The federal courts have always recognized that the timeliness of a motion to intervene under Rule 24 depends upon the date when the applicant for intervention learned that intervention was necessary to protect his interests. *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1125 (5th Cir., 1970). In *Pyle-National Co. v. Amos*, 172 F.2d 425 (7th Cir., 1949), an action by a corporation against its former officers for an accounting for certain sums, a stockholder sought to intervene as a party defendant six months after the litigation had commenced and a matter of weeks before the scheduled commencement of trial. The Court of Appeals held the application for intervention timely because the stockholder had moved to intervene promptly upon learning that the corporation was about to consent to judgment for much less than the full amount allegedly misappropriated by the defendants. 172 F.2d 428. In *Cascade Natural Gas Corporation v. El Paso Natural Gas Company*, 386 U.S. 129 (1967), intervention was sought eight years after the filing of the initial complaint, and long after the case had gone to judgment and been successfully appealed to this Court. Several states and other parties sought to intervene when they learned that the United States sought to settle the case on terms which did not adequately protect their interests. Although the district court disapproved intervention because, inter alia, the motions were made long after the initial judgment, 37 F.R.D. 330 (D. Utah 1965), this Court approved intervention and no member of the Court suggested that the motions to intervene ought have been made earlier. Similarly in another voting rights case, *Apache County v. United States*, 256 F.Supp. 903 (D.D.C., 1966) where inter-

⁵⁵ Affidavit of Eric Schnapper, April 24, 1972, p. 92a.

vention was sought five days after the United States declined to defend an action for exemption from sections 4 and 5, neither the court nor the United States questioned the timeliness of the motion.

In the instant case the NAACP moved to intervene a mere two days after it had learned the United States would not oppose the exemption, and only three days after the government consented to the motion for summary judgment. Both the United States and New York urge that the NAACP should have moved to intervene before the United States consented to the motion for summary judgment, indeed even before it had actual knowledge that this action was pending.⁶⁶ Under the procedure urged by the United States and New York a private party interested in the subject matter of any pending litigation would be required to file a precautionary motion to intervene immediately upon learning of the litigation and even though he might have no objection at that time to the adequacy of those representing his interests. Thus the NAACP, instead of intervening in those few civil rights cases in which it actually disagreed with the position being taken by the United States, would be required to move to intervene in every one of the hundreds of school desegregation, employment and housing discrimination cases brought by the United States. Consumer groups interested in anti-trust matters would have to intervene, not in the rare anti-trust cases which they thought were being mishandled, but in all anti-trust cases. Compare *Nader v. United*

⁶⁶ Motion of United States to Dismiss or Affirm, pp. 3-4; Motion of New York to Dismiss or Affirm, pp. 6-7. Both the United States and New York maintain that intervention should have been sought after a February 6, 1972, newspaper article describing this action. The uncontradicted affidavit filed by counsel for the NAACP in the district court shows that neither he nor any of his clients had read the article or were aware of this litigation until mid-March. Affidavit of Eric Schnapper, April 24, 1972, p. 91a.

States, No. 72-823. Such a massive increase in intervention motions, most of them entirely unnecessary, would only further crowd already congested court dockets. Even if such motions were made at the very threshold of an action, they could not be effectively disposed of when filed. Had the NAACP moved in February 1972 to intervene in this action, it could have made no substantial showing that the United States had not adequately represented its interests; the United States was still maintaining at that time that it would oppose the exemption, and had not even filed its answer. If the District Court had denied a motion to intervene in February, it would clearly have been obliged to reconsider its decision in April after the United States consented to the exemption. If the District Court had granted the motion, the intervenors would have been able to take little if any further action until April when the government's conduct indicated the extent to which their interests were not adequately protected. In either event, the only practical effect of requiring the NAACP to move to intervene *before* April 4 would have been to sidetrack the district court and the other parties to deal with an issue not then ripe for decision.

When the NAACP moved to intervene the only substantive papers which had been filed in the district court were the complaint, the answer, the motion for summary judgment, and the terse consent to that motion. No motion had been decided or even argued. No depositions or other discovery had been taken. No witness had been heard. No trial had commenced, nor any trial date set. No judgment had been entered. No appeal had been sought. No steps had been taken in the case which, because of intervention, would have had to be retraced with possible prejudice to New York or the United States. The NAACP filed with its motion a proposed answer, and stood ready

and able to oppose the motion for summary judgment then pending before the District Court.

It would be particularly inappropriate to hold the instant motion untimely because the intervention sought was of right. The NAACP has no other forum to which it can turn to assure the continued applicability of sections 4 and 5 to Kings, Bronx, and New York Counties. Only the District Court hearing the instant litigation has the power to afford the blacks and other minority groups in the three counties the protections of the Voting Rights Act. To deny applicants' motion to intervene would be to cut them off absolutely and forever from any opportunity to retain for themselves the benefits which Congress sought to confer upon them in enacting the Cooper amendment. Such drastic action under the circumstances would be plainly inconsistent with "the interest of justice" which should control decisions as to timeliness. *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir., 1970).

D. Intervention Was Necessary and Proper to Assist the District Court In Carrying Out Its Responsibilities Under the Voting Rights Act.

Under section 4 of the Voting Rights Act the responsibility for deciding whether to grant or deny an exemption lies ultimately in the hands of the United States District Court for the District of Columbia. An exemption can only be obtained if that court finds as a matter of fact that the jurisdiction involved has not, within the previous 10 years, used its literacy test, or certain other tests or devices, for the purpose or with the effect of denying or abridging the right to vote on account of race or color. The role of the Attorney General in the exemption process is limited to assisting the court by providing evidence as to the purpose and effect of the tests concerned.

An action seeking an exemption is not one which the United States has the power to compromise or settle.⁵⁷

In the instant case, in response to New York's motion for summary judgment, the United States informed the District Court that it would not present the court with any evidence whatever. The District Court was thus asked to resolve a question of paramount importance to the legal rights of 2.2 million blacks and Puerto Ricans without the least semblance of adversary process. Under these unusual circumstances the District Court was singularly ill-equipped to resolve complicated questions of law and fact regarding the election practices and their legal consequences of an unfamiliar state several hundred miles distant. The affidavit of the Assistant Attorney General revealed on its face that the United States had failed to investigate most of the legal and factual questions raised by this action. See pp. 27-36, *supra*. Yet at this point in the proceedings, without first exploring ways of obtaining relevant evidence or otherwise informing itself, the District Court purported to draw the case to a close. The court entered an order not formally finding that New York's literacy test had not been used with a discriminatory purpose or effect, nor finding any facts whatever, but merely reciting that the plaintiff's motion for summary judgment was granted. The absence of such a finding called into question whether the court understood its responsibilities under the statute. It is unclear at best whether the members of the court even made any deter-

⁵⁷ Congress expressly "prevented the Attorney General from making the usual prosecutorial decision that specified individuals or areas are not covered by the statute. . . . The statute does not purport to impose on the court an absolute obligation to accept the Attorney General's determination if the court has reason to believe it is erroneous". Brief of United States in *Apache County v. United States*, Civil Action No. 292-66, District Court for the District of Columbia, p. 16.

mination about the use of New York's literacy test, or whether they felt authorized or even compelled by the government's position to simply grant the motion for summary judgment. The resolution of New York's exemption claim fell far short of the careful scrutiny which Congress must have contemplated would be exercised before the elaborate protections of the sections 4 and 5 of the Voting Rights Act were withdrawn from more than 2 million blacks and Puerto Ricans.

The proper course for the District Court, when confronted by the unusual circumstances of this case, would have been to seek additional evidence and legal argument before reaching any resolution on the merits. Such assistance was not hard to find: only three days after the United States declined to produce any evidence the appellants asked to intervene and to defend this action. The proposed intervenors had a great interest in the outcome of this case, both as black and Puerto Rican residents of the three counties and as plaintiffs in *NAACP v. New York City Board of Elections*. The proposed intervenors, local public officials and a civil rights organization of national repute, were familiar with the problems in the three counties. Neither the competence nor the good faith of the applicants for intervention or of their counsel was ever questioned. The United States did not indicate any opposition to granting the motion for intervention. The appearance of these applicants for intervention afforded the District Court an excellent and sorely needed opportunity to further inform itself before attempting to carry out its responsibilities under the Voting Rights Act.

The proposed answer filed by the NAACP and other applicants with their motion to intervene demonstrated even more clearly the need for further inquiry by the District Court. The answer alleged several specific ways

in which New York's literacy tests had been used with the purpose or effect of discriminating on the basis of race: (1) That the rate of illiteracy was substantially higher among non-white persons of voting age than among whites of voting age. (2) That the difference in literacy rates between whites and non-whites educated in New York was the result of the segregated and inferior education afforded non-whites in New York. (3) That most of the non-whites educated outside New York had been educated in the southern states where they were forced to attend segregated and inferior schools. (4) That large numbers of non-whites were deterred from seeking to register because of the literacy tests, since the tests were administered by a virtually all white staff and conducted in such a way as to humiliate those who could not pass them. These detailed allegations, any one of which if true would have been sufficient to defeat the exemption, were particularly significant because it was clear that the United States had never investigated any of the questions raised.

Additional documents filed subsequently in the District Court by the applicants demonstrated the substantiality of several of these allegations. Census data adduced by the NAACP and others demonstrated that in the decade before this action was commenced illiteracy was two to three times as high among non-whites as among native whites in each of the three counties. The differences in the illiteracy rates shown was substantially greater than that which prompted the denial of an exemption in *Gaston County v. United States*, 288 F. Supp. 678 (D.D.C., 1968), 395 U.S. 285 (1969).¹¹ The applicants for intervention also

¹¹ Those statistics revealed the following. Between 1910 and 1960, when most persons of voting age before 1972 received their education, the proportion of non-white children between 7 and 13 not enrolled in school exceeded the white rate by an average of 30%, and was higher in 1960 than ever before. In 1950 the proportion

offered half a dozen official and semi-official studies of the New York City educational system going back as far as 1915 documenting the extent of discrimination against minority children in the three counties. The studies revealed that throughout this period most non-white children had attended predominantly non-white schools, and that these schools, in comparison to predominantly white schools, were older, had not been renovated for a longer period, spent less per child, and had less special equipment, more teachers who were not fully licensed, and larger classes."

of children ages 7 to 13 more than one grade behind in school was approximately 75% higher among non-white children than among white children, and the amount by which the non-white rate exceeded the white rate actually *rose* the longer the children had been enrolled in school. A more recent study showed that white students in white elementary schools were a year and a half to two years ahead of black and Puerto Rican students in non-white New York schools, and the gap in reading ability *widened* the longer the students were enrolled in school. The tendency of non-white children in non-white schools to fall further and further behind white children in white schools in New York City was noted in *Council of Supervisory Association of the Public Schools of New York City v. Board of Education of the City of New York*, 23 N.Y.2d 458, 463, 297, N.Y.S.2d 547, 551, 245 N.E.2d 204, 207 (1969) modified on appeal, 24 N.Y.2d 1029, 302 N.Y.S.2d 850, 250 N.E.2d 251. In 1960 illiteracy among non-whites was 230% higher than among native whites in New York County, 270% higher than among native whites in Kings County, and 310% higher than among native whites in Bronx County. In *Gaston County v. United States* the rate of illiteracy among blacks was only 70% higher than among whites. 288 F. Supp. 678, 687 (D.C. Cir., 1968). See *Points and Authorities in Support of Motion to Alter Judgment*, pp. 79a-86a.

⁵⁹ Metropolitan Applied Research Center, *Selection From Staines Study of 1969-70* (1972); United Bronx Parents, *Distribution of Educational Resources Among the Bronx Public Schools* (1968); Public Education Association, *The Status of the Public School Education of Negro and Puerto Rican Children in New York City* (1955) (A report prepared for the New York City Board of Education); *Report of the Mayor's Commission on Conditions in Harlem*, chapter 5, "The Problem of Education and Recreation" (1935); Blascoer, *Colored School Children in New York* (1915); *Bulletin*

The applicants attempted to refer the District Court to judicial decisions condemning racial discrimination in both New York City and the school systems in the south from which many black residents of the three counties had emigrated.⁶⁰ The submission of this extensive material

of the *New York Public Library*, "Ethiopia Unshackled: A brief history of the education of Negro Children in New York City" (1965). The 1955 Public Education Association report, for example, compared facilities in schools with less than 10% blacks and Puerto Ricans (denoted Y schools) with those in schools less than 10% or 15% white students (denoted X schools). The Report found that the average Group X elementary school was 43 years old, while the average group Y elementary school was 31 years old. The average Group X junior high school was 35 years old; the average Group Y junior high school was 15 years old. Group X schools were generally equipped with fewer special rooms than Group Y schools and principals in Group X schools were generally less satisfied with their facilities and equipment than those in Group Y schools. An average of 17.2 years had gone by since the last renovation of the Group X elementary schools and 4.3 years for the group X junior high schools; renovation had occurred on the average only 9.8 years before in the Group Y elementary schools and 0.7 years earlier in the Group Y junior high schools, even though the Group Y schools were newer to begin with. Twice as many Group X elementary teachers were on probation as in Group Y, 50% more Group Y elementary teachers had tenure than Group X, and more than twice as many Group X elementary school teachers were under-trained permanent substitutes. The Board of Education was spending an average of \$8.30 per student for maintenance in Group Y elementary schools, but only \$5.30 per student in Group X elementary schools. Expenditures for operation of school plant were \$27.50 per child at Group Y elementary schools and \$19.20 per child in Group X elementary schools. The expenditure per student for instruction was \$195 in the Group Y elementary schools and \$185 in the Group X elementary schools. The average class size in ordinary Group X elementary schools was 35.1, compared to 31.1 in the comparable Group Y schools. The Report also concluded that it had not been the policy of the Board of Education in drawing school district lines to seek to ameliorate the racial isolation caused by housing patterns. See pp. 93a-116a.

⁶⁰ *Chance v. Board of Examiners*, 330 F.Supp. 203 (S.D.N.Y., 1971) (Examinations used by 80 year old Board of Examiners of the City of New York discriminated against non-white applicants

should, by itself, have prompted the District Court to insist on an extensive inquiry into the discriminatory effect of New York's literacy tests. In fact, however, that court chose to bring further proceedings to an end the day after the studies and other data were filed, without even leaving itself adequate time to examine their contents.

The mere fact that appellants sought to intervene on the side of the United States did not preclude the District Court from granting their motion and accepting their assistance. The United States itself did not oppose the motion to intervene. This Court has already held that private parties may step forward and seek to indicate their own and the public interest when dissatisfied with the government's handling of a case in which they have a substantial interest. *Cascade Natural Gas Corporation v. El Paso Natural Gas Company*, 386 U.S. 129 (1967). The instant case does not involve any settlement negotiated by the United States to which a private party seeks to object. The applicants do not seek to substitute their judgment for that of the United States on some matter of public policy. Compare *Cascade Natural Gas*, 386 U.S. at 141-161 (dissent of Justice Stewart). The legal and evidentiary considerations which the NAACP and others ask to present are the very theories urged by the United States before this Court, repeatedly advanced by the At-

for employment in the public school system); *In Re Skipwith*, 180 N.Y.S.2d 852, 14 Misc. 2d 325 (1958); *Gaston County v. United States*, 395 U.S. 285 (1969). The court in *Skipwith* found *inter alia*, (a) that the New York public schools were segregated on the basis of race, (b) that this segregation, whether or not purposeful, had a harmful effect on the education of the non-white children, (c) that the use of less qualified substitute teachers was almost twice as frequent in non-white schools as in white schools in the three counties, (d) that there was a higher proportion of inexperienced teachers in the non-white schools.

torney General at congressional hearings leading to the instant statute, and accepted by the Congress which voted the Cooper Amendment into law.

The decision of the District Court in this case cannot be justified on the ground that the jurisdiction involved is not located in the South. Congress was well aware that it was extending coverage of the Voting Rights Act to the state of New York, and it did so after extensive testimony and debate urging that the problems of racial discrimination were national in scope. Neither the United States nor the courts may apply different standards regarding exemptions according to whether they are sought in the North or in the South, especially in view of repeated expressions of concern in Congress that this may have occurred under the 1965 Act.⁶¹ Any such double standard would create just that appearance of regional discrimination which Congress in 1965 and 1970 was anxious to avoid.⁶² If on a record as strong as that in the instant case intervention is held unavailable to stop the hasty granting of an exemption to a northern jurisdiction, negroes in the south will have no means of preventing the granting of similar exemptions to Mississippi or Alabama. If it were not reversible error to grant an exemption in 1972 to Bronx county, New York, when neither the court nor the government had made any inquiry into illiteracy rates or inequality of educational opportunity, there would be no reversible error in granting an exemption in 1973 after a similarly limited inquiry to Gaston County, North Carolina.

⁶¹ 116 Cong. Rec. 6166 (Remarks of Rep. Poff), 6521 (Remarks of Senator Ervin), 6621 (Remarks of Senator Ervin) (1970).

⁶² Compare *South Carolina v. Katzenbach*, 383 U.S. 301, 360 (1966) (Dissent of Justice Black).

The District Court clearly erred in refusing to permit any inquiry in open court into the issues raised by New York's request for an exemption from sections 4 and 5. Particularly in a case such as this, involving as it does matters of great public import, the courts do not function as mere umpires or moderators bound to accept any arrangements proposed by the named parties, but sit to do justice to all those who may be affected by their decisions. Compare *Simon v. United States*, 123 F.2d 80, 83 (4th Cir., 1941), *certiorari denied* 314 U.S. 694. Where, as here, New York sought to withdraw protections of sections 4 and 5 from millions of blacks and Puerto Ricans, and the United States declined to either present the court with relevant evidence or to advance any related legal considerations, the responsibilities imposed upon the District Court by section 4 dictated that it accept the assistance of responsible intervenors. The District Court thus erred, not only in denying a timely motion to intervene by applicants entitled as of right to intervene, but also in failing to carry out its functions under the Voting Rights Act.

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

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CONCLUSION

The following is a summary of the results of the investigation. The data indicates that the system is capable of performing the required functions. The results are as follows:

- 1. The system is capable of performing the required functions.
- 2. The system is capable of performing the required functions.
- 3. The system is capable of performing the required functions.
- 4. The system is capable of performing the required functions.
- 5. The system is capable of performing the required functions.
- 6. The system is capable of performing the required functions.
- 7. The system is capable of performing the required functions.
- 8. The system is capable of performing the required functions.
- 9. The system is capable of performing the required functions.
- 10. The system is capable of performing the required functions.

The results of the investigation are as follows:

- 1. The system is capable of performing the required functions.
- 2. The system is capable of performing the required functions.
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- 4. The system is capable of performing the required functions.
- 5. The system is capable of performing the required functions.
- 6. The system is capable of performing the required functions.
- 7. The system is capable of performing the required functions.
- 8. The system is capable of performing the required functions.
- 9. The system is capable of performing the required functions.
- 10. The system is capable of performing the required functions.

It is concluded that the system is capable of performing the required functions. The results of the investigation are as follows:

- 1. The system is capable of performing the required functions.
- 2. The system is capable of performing the required functions.
- 3. The system is capable of performing the required functions.
- 4. The system is capable of performing the required functions.
- 5. The system is capable of performing the required functions.
- 6. The system is capable of performing the required functions.
- 7. The system is capable of performing the required functions.
- 8. The system is capable of performing the required functions.
- 9. The system is capable of performing the required functions.
- 10. The system is capable of performing the required functions.

STATUTORY APPENDIX

Section 1973b, 42 United States Code, Section 4 of the Voting Rights Act, provides

§ 1973b. Suspension of the use of tests or devices in determining eligibility to vote—Action by state or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials

or abridgements of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

Required factual determinations necessary to allow compliance with tests and devices; publication in Federal Register

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this

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section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

Definition of test or device

(c) The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any education achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher or registered voters or members of any other class.

Section 1973c, 42 United States Code, Section 5 of the Voting Rights Act, provides

§1973c. *Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of*

voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General

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and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

JAN 22 1973

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-129

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE, NEW YORK CITY REGION OF NEW YORK CON-
FERENCE OF BRANCHES, *et al.*,

Appellants-Applicants for Intervention,

v.

NEW YORK, on behalf of New York, Bronx, and
Kings Counties, *et al.*,

Appellees.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-129

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE, NEW YORK CITY REGION OF NEW YORK CON-
FERENCE OF BRANCHES, *et al.*,

Appellants-Applicants for Intervention,

v.

NEW YORK, on behalf of New York, Bronx, and
Kings Counties, *et al.*,

Appellees.

BRIEF FOR APPELLEE STATE OF NEW YORK

Statement

This action was commenced in the United States District Court for the District of Columbia by the service of a complaint by appellee State of New York on appellee United States of America on December 3, 1971. An amended complaint dated December 16, 1971 was subsequently filed (2a-11a).¹

¹ Numerals in parentheses refer to the Appendix in this appeal.

The relief sought in the amended complaint was for a declaratory judgment under § 4(a) of the Voting Rights Act of 1965, Public Law 89-1101, 70 Stat. 438, 42 U.S.C. § 1973(b) as amended by Public Law 91-285, 94 Stat. 315, that during the ten preceding years, the voting qualifications prescribed in the laws of New York did not deny or abridge the right to vote of any individual on account of race or color, and that the provisions of §§ 4 and 5 of the Voting Rights Act were, therefore, inapplicable in the Counties of New York, Bronx, and Kings in the State of New York.

The aforementioned counties had come within the purview of the Voting Rights Act, because of a determination made by the Bureau of Census that in 1968 less than 50% of the persons of voting age residing in those counties had voted in the Presidential election,² and since New York State, during the years prior to 1970, imposed a literacy requirement as a qualification for voting. N.Y. State Const. Art. II, § 1; N.Y. Election Law §§ 150, 168.

On March 10, 1972 the United States filed an answer to the amended complaint which did not deny the allegations of said complaint except that with respect to a few specific allegations concerning the administration of the literacy test, the answer stated that defendant was without knowledge or information sufficient to form a belief (12a-14a).

Subsequently, on March 17, 1972, appellee New York moved for summary judgment (15a). Appellee's moving papers included an affidavit from Winsor A. Lott, chief of

² The percentage of the voting age population who voted for president in 1968 was determined by the Bureau of the Census to be 45.7% in New York County, 47.4% in Bronx County and 46.4% in Kings County. When the number of voters who participated in the 1968 general election in New York but who did not vote for the office of president is added, the percentage of voting age population who voted in the 1968 election would be 47.7% in New York County, 49.6% in Bronx County and 48.5% in Kings County. Amended Compl., para. 14 (7a).

the Bureau of Elementary and Secondary Educational Testing of the New York State Education Department which annexed copies of all the literacy tests that were used during the years 1961 through 1969 and which attested to the fact that less than 5% of the applicants who have taken these tests have failed (20a-23a). It was also established that in 1968, less than 5% of the applicants who took the literacy test in each of the three affected counties failed. Amended Compl., para. 12 (6a). Affidavits in support of the motion for summary judgment were also submitted by representatives of the Boards of Elections in each of the three affected counties attesting to the manner in which satisfaction of literacy was established prior to 1970 when the literacy test was suspended, and attesting to registration drives that were conducted during the 1960's, particularly in predominantly black and Puerto Rican areas of New York City seeking to encourage minority members to register (24a-38a).

After a four-month investigation by attorneys from the Department of Justice which included an examination of registration records of selected persons in New York, Bronx and Kings Counties, interviews with election and registration officials and interviews with persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties, an affidavit was filed on April 4, 1972 by David L. Norman, Assistant Attorney General in charge of the Civil Rights Division (40a-43a). The Norman affidavit stated that on the basis of that investigation conducted by the Department of Justice "there was no reason to believe that a literacy test has been used in the past 10 years in the counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, except for isolated instances which have been substantially corrected and which, under present practice cannot reoccur." Accordingly, the United States consented to the entry of the declaratory judgment (39a).

Although the nature of this action was public knowledge shortly after it was filed with the Department of Justice (an article concerning the nature of the action appeared in the New York Times on February 6, 1972), appellants did not move to intervene as defendants in this action until April 7, 1972 (44a-47a). On April 11, 1972 appellee New York filed an affidavit and memorandum in opposition to the motion to intervene (67a-70a). On April 13, 1972 the three-judge federal court denied without opinion appellant's motion to intervene and granted appellee New York's motion for summary judgment (71a-72a).

On April 24, 1972 appellants moved to alter the prior judgment (73a-74a). The motion was denied on April 25, 1972 (117a-118a). Thereafter appellants filed a notice of appeal with this Court with respect to the order denying their application to intervene on April 13, 1972 and the order denying their motion to alter judgment (119a-120a). By order of this Court, entered on November 6, 1972, probable jurisdiction was postponed to the hearing of this case on the merits (121a).

Question Presented

Where the State of New York sued for an exemption from the filing requirements of §§ 4 and 5 of the Voting Rights Act of 1965, as amended, and where the submission of affidavits and exhibits from New York election officers and a separately conducted four-month investigation by the United States Department of Justice led that Department to conclude that there was no reason to believe that a literacy test had been used in the past 10 years in the Counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, and to consent to the entry of declaratory judgment, and where the District Court, accordingly, granted the State's motion for summary judgment,

ment, did the District Court err in denying appellants' motion for intervention where such motion was brought after the filing of the Justice Department's consent, where appellants' papers did not show that the Justice Department had not adequately protected the public interest, and where appellants have other adequate legal means of protecting their interests?

Statutes Involved

Sections 4 and 5 of the 1965 Voting Rights Act as amended, 42 U.S.C. § 1973b and 1973c, are set out in the statutory appendix to appellants' brief (pp. S.A. 1-S.A. 5).

Rule 24, Fed. Rules Civ. Proc., 28 U.S.C., provides:

"(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application

may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

ARGUMENT

- I. The declaratory judgment was issued by the Court below in accordance with the procedure authorized by Section 4 of the Voting Rights Act of 1965.

The procedure followed by the State of New York in obtaining declaratory judgment exempting three New York counties from the filing requirements of the Voting Rights Act is fully authorized by section 4 of the Voting Rights Act of 1965, as amended by the Voting Rights Act of 1970. 42 U.S.C. § 1973(b).³ The applicable provisions of that section were described by this Court in *South Carolina v. Katzenbach*, 383 U.S. 301, 318 (1966), as follows:

"Statutory coverage of a State or political subdivision under § 4(b) is terminated if the area obtains a declaratory judgment from the District Court for the District of Columbia, determining that tests and devices have not been used during the preceding five years (now ten years) to abridge the franchise on racial grounds. The Attorney General shall consent to entry of the judgment if he has no reason to believe that the facts are otherwise. § 4(a). For the purposes of this section, tests and devices are not deemed to have been used in a forbidden manner if the incidents of discrimination are few in number and have been

³ The section is reprinted in the statutory appendix to the Brief for Appellants.

promptly corrected, if their continuing effects have been abated, and if they are unlikely to recur in the future. * * *

Other states or political subdivisions which have obtained declaratory judgments in similar actions include *Wake County, North Carolina v. United States*, D.D.C., Civil Action No. 1198-66 (January 23, 1967) (plaintiff's motion for summary judgment granted with consent of Government); *Elmore County, Idaho v. United States*, D.D.C., Civil Action No. 320-66 (September 22, 1966) (plaintiff's motion for summary judgment granted with consent of Government); *State of Alaska v. United States*, D.D.C., Civil Action No. 101-66 (August 17, 1966) (plaintiff's motion for summary judgment granted with consent of Government); *Apache County v. United States*, D.D.C., 256 F. Supp. 903 (1966) (plaintiffs' motion for summary judgment granted with consent of Government and motion by Navajo Tribe of Indians and 31 members of Navajo Tribal Council to intervene denied).

Appellants do not challenge the procedure followed below, but base their appeal on the contention that their application to intervene, filed three days after the United States consented to the entry of declaratory judgment, should have been granted by the District Court. Appellants' contention ignores the facts that on the record before it, the District Court had no choice other than to deny the motion for intervention where (1) their motion was not timely and would have seriously disrupted New York's electoral process, (2) appellants did not show any practical impairment of their interests, (3) appellants failed to establish that the Justice Department had not adequately protected the public interest or (4) there was no evidence that New York's literacy test had denied any individual the right to vote on account of race or color.

II. Appellants' application to intervene was not timely.

An application to intervene, whether sought as of right under F.R.C.P., Rule 24(a), or as permissive under Rule 24(b) must be timely or it must be denied. *Alleghany Corp. v. Kirby*, 344 F. 2d 571 (2nd Cir., 1965); *McKenna v. Pan American Petroleum Corp.*, 303 F. 2d 778 (5th Cir., 1962). A motion to intervene after the parties to a proceeding have agreed to the entry of a consent decree is looked on with particular disfavor by the courts and will be denied in other than the most unusual circumstances. See *United States v. Blue Chip Stamp Company*, 272 F. Supp. 432, 436 (D.C. Cal. 1967).

The particular need for promptness in the disposition of section 4 actions brought under the Voting Rights Act was recognized by the District Court in *Apache County v. United States*, 256 F. Supp. 903, 907 (D.D.C. 1966), where it stated:

"It is true, too, that speedy determination of section 4(a) suits brought by state or local governments is desirable. The very existence of this remedy reflects an awareness by Congress that the broad statutory suspension of tests may have an overbroad reach which requires corrective procedures to avoid unintended incursions on legitimate state policy. The special three judge court has a statutory obligation to give the case precedence 28 U.S.C. § 2284."

Although the nature of the instant action was public knowledge since the filing of the complaint on December 3, 1971, appellants did not move to intervene until April 7, 1972. A newspaper article in the *New York Times* on February 6, 1972, p. 48, mentioned the fact that the Citizens Voter Education Campaign of New York State under the chairmanship of Rev. Carl McCall, and that

Representative Herman Badillo, and Borough Presidents Percy E. Sutton of Manhattan and Robert Abrams of the Bronx, had been aware of this action. During the week after the *New York Times* article appeared, the American Civil Liberties Union requested a copy of the amended complaint for possible intervention, but declined to intervene after studying the papers.

In attempting to justify the delay of appellants in moving to intervene in the instant proceeding, appellants' counsel in his affidavit of April 24, 1972 (91a) stated that he had no knowledge of the existence of this action until March 21, 1972. The reason for this lack of knowledge, according to appellants' counsel, was that during the months of December, 1971 and January and February, 1972, he was in the State of New Hampshire, where the only daily paper that he regularly read was the *Concord Daily Monitor and Patriot*. By this story, appellants expected the Court below to believe that no one else in the legal staff or membership of the National Association for the Advancement of Colored People was aware of this action in the three months prior to March 21, 1972 despite the February 6th *New York Times* article and the knowledge of other civil rights organizations and public officials.

After appellants became aware of the above action, they still did not move to intervene until three days after the Justice Department filed its consent to the entry of the requested declaratory judgment. Appellants argue that this delay was occasioned by their belief that the Justice Department would oppose New York's motion for summary judgment. The Justice Department has denied that they ever gave any assurance to appellants that they would contest the motion for summary judgment. See motion to dismiss or affirm filed by the United States Department of Justice in this action, p. 4n.3. In any event, appellants' contention that it waited until the Justice Department's

defense was completed before seeking to intervene is a patently baseless excuse for delay. If such a contention were to be sustained, it would require a plaintiff to win two separate rounds in every lawsuit: first against the named defendant, and secondly against the intervenors who were watching from the sidelines until the defendant's case was completed.

Involved in the issue of timeliness is the question as to "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties". F.R.C.P., Rule 24(b); see *Allen Company v. National Cash Register Company*, 322 U.S. 137 (1944); *Diaz v. Southern Drilling Corp.*, 427 F. 2d 1118, 1125 (5th Cir., 1970).

In the instant case, the granting of appellants' motion to intervene at the time it was brought would have seriously disrupted New York's electoral process.* As soon as corrected 1970 census figures for the State of New York were supplied to the New York Joint Legislative Committee on Reapportionment by the United States Bureau of the Census on October 15, 1971, new legislative district lines were drawn by the Legislature for the 150 assembly and 60 senate districts in the State of New York and for 39 new congressional districts. The legislative redistricting statute was enacted on January 14, 1972 (L. 1972, ch. 11) and new congressional districts were provided by a statute enacted on March 28, 1972 (L. 1972, chs. 76, 77, 78).

* Although only three out of New York's sixty-two counties were covered by the Voting Rights Act Amendments of 1970, the state-wide application of most New York election laws required that they all be submitted for approval prior to the entry of the judgment below. Thus, in *Aponte v. O'Rourke*, S.D.N.Y., Civ. No. 1971-3200, an order was entered enjoining the enforcement, pending Justice Department approval, of Ch. 424 of the Laws of 1971 which added to the number of signatures on designating petitions for certain officers in New York State and Ch. 1096 of the Laws of 1971 which amended the definition of a resident for purposes of voting.

The State of New York was aware of the fact based on the experiences reported by other states that a detailed Justice Department investigation into the consequences of each of the new assembly, senate and congressional lines in three large counties within New York City might require several months to complete which would have prevented the use of the new district lines in time for the spring, 1972 primary elections.* This belief was confirmed by the fact that although the Attorney General of the State of New York submitted to the Justice Department copies of the new legislative redistricting statute and the maps and descriptions of the assembly and senate districts in each of the three counties on January 26, 1972, no reply was received from the Justice Department until March 14, 1972 when the Justice Department advised the State of New York that it had not yet begun its investigation and requested additional information including population and registration statistics by race of each district within the three covered counties.

Since there was no question that the filing requirements of § 5 of the Voting Rights Act were due to the statistical presumptions imposed by § 4 rather than by any evidence that New York's literacy test had discriminated against any individual by reason of race or color, the present lawsuit was instituted to prevent any delay in having the legislative and congressional districts at stake in the 1972 elections governed by 1970 census figures.

The delay sought by appellants' belated intervention in the entry of the judgment relieving New York from the

* The new state legislative and congressional district lines, in order to comply with the principle of "one man, one vote" do not coincide with county lines. Districts in the Bronx include portions of Westchester County, while portions of Kings County are joined to Queens and portions of New York County are joined to Richmond. Accordingly, it would be impossible to immediately implement the new district lines for the other fifty-nine counties of the State while suspending the effective date for the district lines in the three covered counties.

filing requirements, would have unquestionably resulted in the holding of primary and general elections in New York State in 1972 based on population figures that were 12 years out of date.

III. Appellants do not have an absolute right to intervene.

A. No statute of the United States confers an unconditional right to intervene in a Section 4 action.

The Voting Rights Act "makes no express provision for intervention", but "rather contemplates that the Attorney General will protect the public interest in defending section 4(a) actions". *Apache County v. United States*, 256 F. Supp. 903, 906 (D.D.C., 1966). No other statute of the United States provides for an unconditional right to intervene in a § 4(a) action. Thus, appellants' application to intervene cannot rest upon F.R.C.P., Rule 24(a)(1).

B. Appellants have failed to establish a significant impairment of their interests to warrant intervention as of right.

To intervene pursuant to Rule 24(a)(2), in addition to the requirement of timeliness, "the applicant must generally show three things: 1) that he has a recognized interest in the subject matter of the primary litigation, 2) that his interest might be impaired by the disposition of the suit, and 3) that his interest is not adequately protected by the existing parties". *Edmondson v. State of Nebraska*, 333 F. 2d 123, 126 (8th Cir., 1967); see also *United States v. Atlantic Richfield Company*, 50 F.R.D. 369 (S.D.N.Y., 1970), *aff'd Bartlett v. United States*, 401 U.S. 986 (1971).

When Rule 24(a)(2) speaks of "an interest relating to the property or transaction which is the subject of the action", "[w]hat is obviously meant there is a significantly

protectable interest". *Donaldson v. United States*, 400 U.S. 517, 531 (1971). Appellants have failed to show such a "significantly protectable interest" as to warrant their right to intervene as of right.

Every one of the named individual appellants were and are duly registered voters in the State of New York (54a-55a). Appellants' papers submitted to the District Court fail to establish how any of these individuals would be directly injured by the entry of the declaratory judgment in this action. Indeed, there is not a single shred of evidence in any of the papers submitted by appellants to the District Court to indicate that any citizen has been denied the right to vote in the State of New York on account of his race or color.

Since appellants are assuming that they have the same rights as the original parties in this action, they must be held to the same standards in determining whether they have proper standing. "Mere concern without a more direct interest cannot constitute standing in the legal sense" to justify intervention. *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Boston Tow Boat Co. v. United States*, 321 U.S. 632 (1944); see also *Spangler v. Pasadena City Board of Education*, 427 F. 2d 1352 (9th Cir., 1970), where parents of school children dissatisfied with a desegregation decree accepted by the School Board were held to have no right to intervene; *Hatton v. County Board of Education of Maury County, Tenn.*, 422 F. 2d 457 (6th Cir., 1970), involving a similar denial of a motion by parents to intervene in a desegregation proceeding; *Horton v. Lawrence County Board of Education*, 425 F. 2d 735 (5th Cir., 1970), where a motion of the National Education Association to intervene in a school desegregation case was denied; *Chance v. Board of Examiners*, 51 FRD 156 (S.D.N.Y., 1970), involving a denial of a motion to intervene by the Council of Supervisory Associations in a suit challenging testing procedures for principals.

Appellants base their argument that they have a substantial interest warranting their intervention as of right upon two contentions. First, they purport to rely on their presence as plaintiffs in a pending proceeding in the United States District Court for the Southern District of New York to compel New York to comply with § 5. That action, *NAACP v. New York City Board of Elections*, 72 Civ. 1460 (52a-62a), was not filed until April 7, 1972—the same date that appellants moved to intervene in the instant action in the District of Columbia. The same failure on the part of appellants to show significant injury to their interests in the principal action or to comply with requirements of timeliness cannot be salvaged by the boot-strap attempt to bringing a similar action in another court.

The second allegedly significant interest that appellants cite as a basis for intervention is their "general interest" in protecting black citizens from legislation which they believe may result in racial discrimination. However, appellants have failed to show how the District Court's denial of their motion to intervene has prevented them from their purported objective of protecting the rights of black citizens. If they believe that any of the new assembly, senate or congressional district lines were the product of racial discrimination, and violative of the Fourteenth and/or Fifteenth Amendments, they may seek remedial relief in a civil rights action in one of the federal district courts in the State of New York. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Wright v. Rockefeller*, 376 U.S. 52 (1964). Indeed, there is no reason why appellants cannot amend their present action in the Southern District of New York to seek such relief unless their reluctance to do so results from a lack of evidence to support such charges. Similarly, appellants are well aware that they are not precluded by the declaratory judgment in this action from challenging any future New York statute or regulation

affecting the electoral process by bringing a civil rights action in the state or federal courts. The availability of these alternative remedies negate appellants' contention that their interests have been significantly impaired⁶ by the disposition of this suit. See *Edmondson v. State of Nebraska, supra*; Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harvard L.R. 721, 750 (1968).

C. Appellants have failed to show inadequate representation by the United States Department of Justice.

(1) The Justice Department investigation

An applicant seeking intervention is required under Rule 24(a)(2) to establish that its interest is not being adequately represented by existing parties. *Edmondson v. Nebraska, ex rel. Meyer*, 333 F. 2d 123 (8th Cir., 1967). Where the proposed intervenor seeks to assert some general public interest in a suit in which a public authority charged with the vindication of that interest is already a party, it has been the general policy of this Court to deny intervention. See *In re Engelhard & Sons Company*, 231 U.S. 646 (1914); *City of New York v. Consolidated Gas Company of New York*, 253 U.S. 219 (1920); *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137 (1944); *Ball v. United States*, 338 U.S. 802 (1949), Mr. Justice Stewart dissenting in *Cascade Natural Gas*

⁶ According to the Advisory Committee which drafted the 1966 revision of Rule 24:

Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be *substantially impaired by the disposition of the action*, he ought to have a right to intervene in the action on his own motion. Advisory Committee, Note 3B Moore, Federal Practice, § 24.01[10], p. 24-16. (Emphasis added.)

Corp. v. El Paso Natural Gas Company, 386 U.S. 129, 149, 155-159 (1967).¹

In denying intervention to the Navajos in a section 4 proceeding under the Voting Rights Act in *Apache County v. United States*, 256 F. Supp. 903 (D.D.C., 1966), the District Court stated that:

" * * * Congress assigned to the Attorney General the primary role in vindicating the public interest under the Act. We should be reluctant indeed to permit intervention in a section 4(a) action in the absence of a plausible claim that the Attorney General is not adequately performing his statutory function, and that intervention is needed to enable the court properly to perform its declaratory function or in some other way to protect the public interest."

The Court went on to declare that the proposed intervenors would have a heavy burden of proof in showing that the Justice Department had been derelict or deficient in protecting the public interest in the defense of the action so as to warrant intervention.

In the instant action, the Justice Department conducted a four-month investigation into the allegations of the complaint before consenting to the entry of a declaratory judgment. As noted in the affidavit of the Assistant Attorney General in charge of the Civil Rights Division (40a-43a), attorneys from the Department of Justice examined registration records of selected persons in each covered county, conducted interviews with election and registration officials and interviews with persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties.

¹ Unlike the facts in *Cascade Natural Gas Corp. v. El Paso Natural Gas Company*, *supra*, the instant case does not present the question as to whether the original parties to the action have complied with prior directives of this Court.

In answer to the Justice Department's request, the Board of Elections supplied the Department with selected election districts in each of the three affected counties that were predominantly white, predominantly black, predominantly Puerto Rican and districts that contained mixed populations. The Justice Department was unable to uncover any evidence that would indicate that the predominantly black or Puerto Rican districts suffered as a result of the imposition of English language literacy tests or were treated any differently than predominantly white election districts (42a). Accordingly, the Justice Department concluded that "there was no reason to believe that a literacy test has been used in the past ten years in the Counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, except for isolated instances which have been substantially corrected and which under present practice cannot reoccur."

*The isolated instances referred to in the Norman affidavit (41a-42a) raised questions which were answered to the Justice Department's satisfaction by the affidavit of Alexander Bassett of March 30, 1972 (33a-38a). The Justice Department's investigation found that Spanish-language affidavits to assist voting registrations were not fully available until the fall of 1967. However, the Bassett affidavit pointed out that inspectors during the fall of 1966 were instructed to permit Spanish-speaking persons to have affidavits concerning proof of literacy filled out outside the presence of the inspectors so that individuals could obtain assistance in translation (33a). The Justice Department investigation "did not reveal any individual citizens whose inability to register is attributable to the absence of Spanish-language affidavits" (42a).

A further question was raised in the Justice Department's investigation in finding that proof of literacy was indicated on certain registration records after August 7, 1970. The Bassett affidavit explained that while proof of literacy was not required after the passage of the 1970 amendments to the Voting Rights Act, inspectors were advised to ask for proof of literacy after a new voter was registered to be kept on record in the event that the new Voting Rights Act amendments, which were then being tested before this Court in *Oregon v. Mitchell*, 400 U.S. 112 (1971), were held invalid.

(2) *The application of New York's literacy test*

If appellants were in possession of any evidence that individuals were subjected to discrimination by reason of their race or color in the conduct of the literacy tests, they could have presented such evidence to the Justice Department. None of appellants' papers indicate that they are in possession of such evidence.

In their initial motion to intervene, appellants offer no factual proof to substantiate a claim of discrimination in the conduct of literacy tests. In their "motion to alter judgment", which appellees did not have an opportunity to respond to, appellants raised the argument that purportedly unequal conditions in the New York City schools (based on a 1955 study, 93a-116a) would handicap black and Puerto Rican citizens in meeting New York's literacy requirement. What appellants have conveniently ignored in raising such an argument is the fact that the State of New York, until the time that literacy tests were suspended in 1970, accepted as proof of literacy, the completion of six grades of elementary school (prior to 1965, proof of completion of eight grades of elementary school was required). See New York Election Law, § 168; affidavit of Darby M. Gaudia (24a-26a). Thus, the argument that students attending predominantly black or Puerto Rican schools in New York City or elsewhere would face a handicap in passing New York's literacy test, is irrelevant as well as baseless since by their completion of six grades, there would be no need for them to pass a literacy test to register to vote. By no stretch of the imagination can the situation of New York be compared to the facts in *Gaston County v. United States*, 395 U.S. 285 (1969), where the official policy of the State had been to maintain separate and inferior schools for blacks and where even the attainment of a high school diploma did not relieve black citizens from the requirement of passing literacy tests.

Certainly, the mere fact that New York imposed an English literacy requirement cannot be cited as evidence of racial discrimination. The right of a state to impose an English literacy requirement has been sustained by this Court. *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959). Although New York's literacy requirements may no longer be enforced to the extent that they are inconsistent with 42 USC § 1973(b)(c), courts have refused to declare that New York's literacy requirements constituted a denial of equal protection. *Camacho v. Doe*, 31 Misc.2d 692, 221 N.Y.S.2d 262 aff'd 7 N.Y.2d 762, 163 N.E.2d 140 (1959); *Camacho v. Rogers*, 199 F. Supp. 155 (S.D.N.Y., 1961); *Socialist Worker Party v. Rockefeller*, 314 F. Supp. 984, 999 (S.D.N.Y., 1970); *Cardona v. Power*, 384 U.S. 672 (1966).

It may be remembered that when South Carolina attacked the constitutionality of the 1965 Voting Rights Act on the grounds that section 4 actions would place an impossible burden of proof upon states and political subdivisions, this Court noted that the Attorney General had pointed out during hearings on the Act that "an area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then refute whatever evidence to the contrary may be adduced by the Federal Government." *South Carolina v. Katzenbach*, 383 U.S. 301 332 (1966).

The State of New York clearly met its burden entitling it to a declaratory judgment. The affidavit of Winsor A. Lott (20a-23a), which contains copies of all literacy tests that were given by the State of New York from 1961 to 1969 shows that the literacy tests consisted of a short paragraph in simple English followed by eight questions which could be answered in one or a few words. The answers were found in the paragraph. No outside knowledge was required. The tests were distributed with corresponding

answer keys geared to minimize the discretion of the graders. Anyone with a minimal amount of English comprehension should have been able to pass the test. The evidence established that over 95% of the applicants each year who took the literacy test passed it throughout the State and in each of the three affected counties.

In speaking of the New York literacy test for voting, McGovney, in his study, *The American Suffrage Medley* (1949), stated (p. 62) that:

"New York is the only state in the Union that both has a reasonable reading requirement and administers it in a manner that secures uniformity of application throughout the state and precludes discrimination, so far as is humanly possible."

See also Justice HARLAN dissenting in *Katzbach v. Morgan*, 384 U.S. 641, 663-664 (1966).

The failure of any person to register and vote in the Counties of New York, Bronx and Kings is and was in no way related to any purpose or intent on the part of the officials of those counties or the State of New York to deny or abridge the right of any person to vote on account of race or color.

Indeed, the named counties have in the past actively encouraged the full participation by all of its citizens in the affairs of government.

Central registration takes place throughout the year at the Board of Elections. Local registrations are also conducted every October for a three or four day period. In each county in New York City and in each election district in each county are polling places designated for local registration. See affidavit of Alexander Bassett, sworn to March 16, 1972 (16a-19a).

To further expand the number of registrants in New York, since 1966, if the prospective registrant demon-

strated by certificate, diploma or affidavit that he had completed the sixth grade in a public school in, or private school accredited by any State or the Commonwealth of Puerto Rico, in which the predominant language was Spanish, he was permitted to register without proof of literacy in English. July 28, 1966, Op. Atty Gen., 121. The Attorney General of New York set forth guidelines recommending that the affidavits be printed in English and Spanish to avoid language difficulties. In 1967, this became the practice (See affidavit of Bassett, *supra*, 17a).

Moreover, beginning in 1964, New York City embarked upon an intensive effort to gather new voters at considerable expense. Every year since, except 1967, the New York City Board of Elections has sponsored *summer* registration drives to encourage more people to register. In 1964, registrations were conducted in local firehouses throughout the City (Affidavit of Beatrice Berger, sworn to March 17, 1972, 27a-29a). Since 1965, mobile units have been sent out into areas containing a high density of black residents and local branches of the Board of Elections have been added to those areas (18a-19a, 25a, 28a, 31a). With each new voter registration drive came a wave of publicity in the news media requesting citizens to register (28a, 31a).

Thus, far from discriminating against new voters by reason of race or color, the State and City of New York has actively sought to encourage members of minority groups to register and vote.

IV. Appellants have failed to establish that the Court below abused its discretion in denying appellants' motion to intervene.

Where there is no absolute right to intervene under Rule 24(a), an applicant's right to intervention is, at best, permissive and depends upon the discretion of the trial court.

An order denying permissive intervention is not appealable unless it can be clearly shown that the Court abused its discretion. *Brotherhood of Railroad Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 524-525 (1947); *United States v. California Canneries*, 279 U.S. 553, 556 (1929); *Stadin v. Union Electric Company*, 309 F. 2d 912, 920 (8th Cir., 1962), cert. denied 373 U.S. 915 (1963).

As this Court stated in *Brotherhood of Railroad Trainmen v. Baltimore & O.R.R.*, *supra*, at p. 524:

"Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. *United States v. California Canneries*, 279 U.S. 553, 556. The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability. * * *"

It has already been seen that no significant interest of appellants has been injured by the decree below. They remain free to challenge any New York election law or regulation that they believe may be racially discriminatory in any appropriate civil rights action in the federal or state courts.

It further has been shown (POINT II, *supra*) that appellants' application to intervene was not timely and that its belated intervention would have seriously disrupted New York's electoral processes by delaying the applicability of new assembly, senate and congressional district lines beyond the 1972 elections. Under these circumstances, there can be no legitimate claim that the District Court

abused its discretion in denying appellants' application for intervention.

Since appellants have not established an absolute right to intervene and there has been no showing of an abuse of discretion by the District Court in denying them intervention, this appeal must be dismissed. *Brotherhood of Railroad Trainmen v. Baltimore & O.R.R., supra; Sam Fox Publishing Company v. United States*, 366 U.S. 683, 687-688 (1961).

CONCLUSION

For the foregoing reasons, this appeal should be dismissed, or in the alternative, the judgment below should be affirmed.

Dated: New York, New York, January 17, 1973.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-129

**NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COL-
ORED PEOPLE, NEW YORK CITY REGION OF NEW YORK
CONFERENCE OF BRANCHES, ET AL., APPELLANTS**

v.

THE STATE OF NEW YORK, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

BRIEF FOR THE UNITED STATES

DECISION BELOW

The order of the district court (App. 71a) is not reported.

JURISDICTION

The district court's order denying appellants' motion to intervene and granting summary judgment in favor of the State of New York was entered on April 13, 1972 (App. 71a). The court denied appellants' motion to alter judgment on April 25, 1972 (App. 117a). Appellants filed a notice of appeal on May 11, 1972 (App. 119a) and a Jurisdictional State-

ment on July 21, 1972. The jurisdiction of this Court is invoked under 42 U.S.C. 1973b(a).

QUESTION PRESENTED

Whether the district court erred in denying appellants' motion to intervene in the circumstances of this suit seeking a declaratory judgment under Section 4(a) of the Voting Rights Act of 1965.

STATUTES INVOLVED

Sections 4 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973b and 1973c, are set forth in the Appendix to appellants' brief (S.A.1-S.A.5).

Rule 24 of the Federal Rules of Civil Procedure provides in relevant part:

(a) *Intervention of right.* Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or

prejudice the adjudication of the rights of the original parties.

STATEMENT

Since we believe the issue here turns on whether the district court properly exercised its discretion in denying appellants' motion to intervene in light of the timing of the motion, the allegations made therein and the other circumstances of this case, we describe the proceedings below in detail.

A. PROCEEDINGS PRIOR TO APPELLANTS' MOTION TO INTERVENE

On December 3, 1971, the State of New York, on behalf of New York, Bronx and Kings Counties, filed suit in the United States District Court for the District of Columbia under Section 4(a) of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973b(a), seeking a declaratory judgment granting an exemption from certain provisions of that Act (App. 1a).¹

The amended complaint stated that prior to and after 1961 the State had required, pursuant to its constitution, that new voters be able to read and write English, but that the State had complied with Section 4(e) of the Voting Rights Act of 1965, which in part provided that persons who had completed the sixth primary grade in public school in any State, the District of Columbia or Puerto Rico could not be disqualified from voting because of inability to read

¹ On December 16, 1971, New York filed an amended complaint (App. 2a-9a).

or write English, 42 U.S.C. (Supp. IV, 1964 ed.) 1973b(e).²

The complaint further stated (App. 5a) that amendments to the Voting Rights Act of 1970³ brought these three New York Counties within the coverage of Sections 4(a) and 5 of the Act, as amended, 42 U.S.C. 1973b(a), 1973c.⁴ Section 4(a) suspends literacy tests and similar voting qualifications for ten years from "the last occurrence of substantial voting discrimination" in States and political subdivisions within Section 4(b);⁵ and Section 5 suspends "all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination." *South Carolina v. Katzenbach*, 383 U.S. 301, 315-316. The State alleged that in the preceding ten years no test or device had been used in these three Counties with the purpose or effect of

² The amended complaint also stated that the New York City Board of Elections provided new voters with English-Spanish affidavits that could serve as a substitute for a diploma or certificate showing that the prospective voter had the requisite amount of education under the Voting Rights Act of 1965 (App. 3a-4a).

³ P.L. 91-285, 84 Stat. 315; see 42 U.S.C. 1973b(b).

⁴ The Attorney General had determined that New York, Bronx and Kings Counties "maintained on November 1, 1968, any test or device" (see App. 8a) and the Director of the Census had determined "that less than 50 per centum of [the persons of voting age residing therein] voted in the presidential election of November 1968" (see 36 Fed. Reg. 5809 (March 27, 1971)). 42 U.S.C. 1973b(b).

⁵ With respect to States and political subdivisions not covered by Section 4(a), Title II of the 1970 amendments also suspended the use of all literacy tests until August 6, 1975, see *Oregon v. Mitchell*, 400 U.S. 112, 131 (opinion of Mr. Justice Black). See p. 16, *infra*.

denying the right to vote on account of race or color, and that no court of the United States had, during this period, found that the right to vote had been so abridged in these areas (App. 6a). With respect to the literacy tests administered in 1968, the failure rate was 3.3 percent in New York County, 4.8 percent in Bronx County, and 4.6 percent in Kings County, with the result that 10,147 persons of the 10,574 taking the tests passed (*ibid.*).

On the basis of these claims and the State's further allegations that the three Counties had, since 1964, conducted extensive voter registration drives and encouraged full participation by all their citizens in the affairs of government, the State sought the convening of a three-judge court and a declaratory judgment that these Counties were not subject to Sections 4 and 5 of the Voting Rights Act because, in the preceding ten years, "the voter qualifications prescribed by the State of New York * * * have not been used by the [three Counties] for the purpose or with the effect of denying or abridging the right to vote on account of race or color * * *" (App. 8a-9a).

On March 10, 1972, the United States filed its answer to the complaint, stating that it was "without knowledge or information sufficient to form a belief" about whether the literacy tests conducted in the three Counties had the purpose or effect of denying the right to vote, but that after the 1970 amendments to the Voting Rights Act "the suspension of the literacy requirement was not uniformly implemented" (App. 13a).

On March 17, 1972, the State filed a motion for summary judgment (App. 15a) with accompanying affidavits from the Administrator of the Board of Elections of New York City, which includes New York, Bronx and Kings Counties; the Chief of the State Bureau of Elementary and Secondary Educational Testing; and the Chief Clerks of the New York, Bronx and Brooklyn Borough Offices of the New York City Board of Elections (App. 15a-32a). The affidavits stated that after the amendments to the Voting Rights Act in 1970, which suspended the use of literacy tests in all States throughout the country, see note 5, *supra*, Election Board employees were instructed that proof of literacy was no longer required, that any disregarding of this instruction was unauthorized and involved only isolated instances (App. 17a-18a, 25a-26a, 28a-29a, 31a-32a, 33a),⁶ and that a new instruction in this regard would be issued (App. 18a). The affidavits also recited that voter registration drives had been conducted each year since 1964, with the exception of 1967, that "[e]mphasis during the branch registration was given in particular to areas with high density black population," and that "[c]onsiderable money was expended in conduction of these vote registration drives and in encouraging people to register" (App. 18a-19a; see also *id.* at 25a, 28a, 31a).

On April 3, 1972, the United States filed a memorandum consenting to the entry of a declaratory judgment, as required by Section 4(a) of the Voting Rights

⁶ See App. 34a-36a, instructing all of the State's Board of Elections that on or after August 7, 1970 "no proof nor test of literacy shall be required" (emphasis in original).

Act when the Attorney General has no reason to believe that any test or device had been used during the preceding ten years for the purpose or with the effect of abridging the right to vote on account of race or color (App. 39a). 42 U.S.C. 1973b(a). In an accompanying affidavit, David L. Norman, Assistant Attorney General, Civil Rights Division, stated in part that at his direction Department of Justice attorneys had "conducted an investigation which consisted of examination of registration records in selected precincts in each covered county, interviews of certain election and registration officials and interviews of persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties" (App. 40a). On the basis of the investigation, the Attorney General had determined, under Section 4(a) of the Voting Rights Act, that he had no reason to believe that New York's literacy test had been used with the proscribed purpose or effect (App. 41a). The investigation had disclosed "no allegation by black citizens that the previously enforced literacy test was used to deny or abridge their right to register and vote by reason of race or color" (*ibid.*) and no "individual citizens whose inability to register is attributable to the absence of Spanish language affidavits" (App. 42a). Although the State had not required a literacy test after the 1970 amendments to the Voting Rights Act, there were notations on some registration applications indicating that proof of literacy had been recorded; but the State had later taken reasonable steps to ensure that registration officials were aware of the suspension of literacy tests and the previous notations

on the applications had been made in view of the contingency that the courts might rule in favor of state challenges to the 1970 amendments of the Act (App. 42a).⁷

B. APPELLANTS' MOTION TO INTERVENE

On April 7, 1972, appellants—the National Association for the Advancement of Colored People (NAACP), New York Branch, and five nonwhite, “duly qualified” voters of Kings County—filed a motion seeking leave to intervene as party defendants (App. 44a–47a). It appears that appellants intended to proceed under Rule 24(a), Fed. R. Civ. P. (intervention “as of right”) rather than under Rule 24(b) (“permissive” intervention), although the motion makes no reference to Rule 24. Appellants claimed an interest in the subject of the action on the basis that if the court granted New York’s motion for summary judgment, thereby exempting the Counties from Sections 4 and 5 of the Voting Rights Act, appellants’ suit against the New York City Board of Elections “would necessarily fail” (App. 45a). This suit—*NAACP v. New York City Board of Elections* (No. 72 Civ. 1460, S.D.N.Y.)—had also been instituted on April 7, 1972, a few hours before appellants filed their motion to intervene here (App. 92a), and challenged the Assembly, Senatorial and Congressional districts in Kings, Bronx and New York Counties, which had been adjusted by the State on the basis of the 1970

⁷ See *Oregon v. Mitchell*, 400 U.S. 112.

census.³ In their suit against the New York City Board of Elections, appellants sought an injunction against implementation of the redistricting of these Counties, which were covered by the Voting Rights Act, contending that the State had violated Section 5 of the Act because the Attorney General of the United States had not yet cleared the new districts (App. 60a). (The issue whether the clearance requirement of Section 5 applies to reapportionment acts of state legislatures is before this Court in *Georgia v. United States*, No. 72-75, probable jurisdiction noted, October 16, 1972.)⁴

In their motion to intervene in the instant case appellants further alleged that the United States was not adequately representing their interests because appellants' attorney—Eric Schnapper—had been told by "attorneys in the Department of Justice" during the three weeks preceding April 3, 1972, that "the United States would oppose New York's motion for summary judgment" (App. 46a), and because none of the three Justice Department attorneys appellants' counsel talked with asked him whether he or his clients had any information regarding whether the three Counties should continue to be subject to Sections 4 and 5 of the Voting Rights Act (App. 46a-47a). Appellants'

³In their complaint against the New York City Board of Elections, appellants stated that the new Assembly and Senatorial districts had been signed into law on January 14, 1972 (App. 57a [the date is there misprinted as 1971]), and that the new Congressional districts had been signed into law on March 28, 1972 (App. 58a).

⁴See p. 25, *infra*.

attorney filed an affidavit with the motion to intervene repeating these allegations (App. 48a-51a).

The United States filed no response to appellants' motion to intervene and did not otherwise object to the motion.

On April 12, 1972, the State filed an affidavit from the Assistant State Attorney General opposing appellants' intervention (App. 67a-70a). The affidavit stated that this action had been pending for more than four months, during which Justice Department attorneys had been conducting an investigation and appellants "were *clearly* on notice that this action had been instituted" in view of the widespread publicity it had received (App. 67a-68a [emphasis in original]). Moreover, appellants had had more than four months to present evidence to the Justice Department that the State had used literacy tests to deny the right to vote on account of race, but had not done so (App. 68a), and even appellants' proposed Answer did not allege "any facts of discrimination other than a general allegation of educational inequality" (*ibid.*). The affidavit stated further that appellants' "real purpose is *not* to challenge the application of the literacy test which is central to this action" but rather to attack the State's reapportionment of voting districts in these three Counties (App. 68a-69a). The affidavit alleged that delay in deciding this case would jeopardize the selection of candidates for Congress and state office and the selection of delegates to the Democratic National Convention in view of the coming primary elections scheduled for June 20, 1972, and "would

make it unlikely that a June primary could take place in New York State on District lines based on the 1970 Census figures" (App. 69a-70a).

C. THE DECISION BELOW

On April 13, 1972, the three-judge district court, without opinion, denied appellants' motion to intervene and granted the State's motion for summary judgment (App. 71a-72a).

1. *Subsequent Proceedings.* Thereafter, on April 24, 1972, appellants filed a Motion to Alter Judgment (App. 73a-74a), together with "Points and Authorities" (App. 75a-90a) and another affidavit of appellants' counsel, Eric Schnapper (App. 91a-92a). Apparently believing that the district court had denied leave to intervene because appellants' motion was untimely, appellants' counsel stated in his affidavit that he did not know of this action until March 21, 1972, and had not read about it in the newspapers before that time (App. 91a), but see pp. 34-35, *infra*; appellants' counsel also said that "[t]o the best of my knowledge" the applicants for intervention—the NAACP and five individuals—did not know of this action before March 21, 1972 (ibid.), but see pp. 43-44, *infra*. Appellants urged the court to reverse its prior ruling and permit them to intervene (App. 73a). In their "Points and Authorities," appellants argued that "factual questions as to discriminatory effect of the literacy tests are tremendously complex" and set forth a list of matters that should be explored by the court in an evidentiary trial (App. 77a-90a).

One day later, on April 25, 1972, the district court denied, without opinion, appellants' motion to alter the judgment (App. 117a-118a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The declared purpose of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973-1973aa-4, is to enforce the guarantee of the Fifteenth Amendment to the Constitution that the right to vote shall not be denied or abridged on account of race or color.¹⁰ The Act is primarily aimed at literacy tests and "similar tests and devices" used to deny citizens, because of their race or color, the right to vote in federal, state and local elections.¹¹

As originally enacted, the Act had three key features: (1) a triggering mechanism that determined the applicability of the Act's substantive provisions; (2) a temporary suspension of "tests or devices"; and (3) a procedure for review of substantive qualifications and practices and procedures relating to voting adopted by States and political subdivisions after November 1, 1964.

Before the 1970 amendments, the substantive provisions of the Act became effective in the first instance only following two factual determinations specified as

¹⁰ See, e.g., 42 U.S.C. 1973a(a)-(c), 1973b(a) and (e).

¹¹ Section 4(c), 42 U.S.C. 1973b(c). The phrase "test or device" is defined as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

follows in Section 4(b), 42 U.S.C. (Supp. IV, 1964 ed.) 1973b(b) :

* * * in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

The 1970 amendments to the Act/ expanded the triggering conditions to include the following two determinations (Section 4(b), as amended, 42 U.S.C. 1973b(b)) :

* * * On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.

Section 4(b) further provides that these determinations become effective upon publication in the Federal Register and are not reviewable in any court.

Both determinations under the sentence added to Section 4(b) by the 1970 amendments were made with respect to New York, Bronx and Kings Counties in the State of New York (36 Fed. Reg. 5809 (March 27, 1971)).

As an immediate and automatic consequence of these administrative determinations, enforcement of tests or devices is suspended in the affected State or subdivision. While this suspension of tests and devices is in effect, Section 5 precludes the State or subdivision from administering "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on" November 1, 1968,¹² without first obtaining either the acquiescence of the Attorney General or a declaratory judgment from a three-judge district court in the District of Columbia that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c.

The foregoing provisions continue in effect with respect to States and subdivisions brought within coverage by the administrative determinations under Section 4(b), unless, pursuant to Section 4(a), as amended, 42 U.S.C. 1973b(a):

the United States District Court for the District of Columbia in an action for a declaratory

¹² If the Section 4(b) determinations were made under the first sentence of that Section, the applicable date is November 1, 1964; the date of November 1, 1968, applies to deter-

judgment brought by such State or subdivision against the United States has determined that no * * * test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color * * *.

Such actions for exemption are to be heard by a three-judge court under 28 U.S.C. 2284, with appeal lying directly to this Court. 42 U.S.C. 1973b(a).

Section 4(a) directs the Attorney General to "consent to the entry of such [declaratory] judgment" if he determines that he has "no reason to believe"¹³ that

minations made, as in this case, under the second sentence of Section 4(b).

¹³ The last paragraph of Section 4(b) of the Act provides:

"A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register." We believe that this paragraph does not apply to determinations by the Attorney General under Section 4(a) that he has no reason to believe that literacy tests have been used to deny the right to vote on account of race or color. The nonreviewability clause of the paragraph is tied to the publication requirement and applies only to determinations under Section 4(b) and Section 6, as the court held in *Apache County v. United States*, 256 F. Supp. 903, 907 (D.D.C.) (three-judge court) and as this Court appeared to assume in *South Carolina v. Katzenbach*, 383 U.S. 301, 317-318, 320-322, 329-333. See also S. Rep. No. 102 (Pt. 3), 89th Cong., 1st Sess. 22 (1965); *Hearings on S. 1564 before the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 67 (1965).

Neither in the present case nor in similar cases has the Attorney General's determination under Section 4(a) been published in the Federal Register.

any such test or device has been so used during the preceding ten years,"¹⁴ and Section 4(d) provides that:

no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

In addition to the changes in the Act mentioned above, the 1970 amendments "prohibited until August 6, 1975, the use of any test or device resembling a literacy test in any national, state, or local election in any area of the United States where such test is not already proscribed by the Voting Rights Act of 1965," *Oregon v. Mitchell*, 400 U.S. 112, 131-132 (opinion of Mr. Justice Black). See 42 U.S.C. 1973aa. Thus, even if a State or subdivision is not otherwise covered by the Act, it cannot use a literacy test until 1975. Also, by 1975 States and subdivisions brought within cover-

¹⁴ A proviso to Section 4(a) prohibits the entry of a declaratory judgment terminating applicability with respect to any plaintiff if a court of the United States has, within the preceding ten years, entered a final judgment determining that the right to vote has been denied on account of race or color by the use of such tests or devices anywhere in the territory of the plaintiff.

No such final judgment has been entered with respect to the State of New York or any of the three Counties involved in this case.

age of the Act in 1965 may be able to avoid the clearance procedures of Section 5 and the Section 4(a) prohibition against using a "test or device" by proving that they have not imposed a test or device in violation of Section 4 for a ten-year period. Cf. *Allen v. State Board of Elections*, 393 U.S. 544, 593, n. 12 (Mr. Justice Harlan, concurring in part and dissenting in part). By 1980, States and subdivisions brought within coverage of the Act by the 1970 amendments, such as the New York Counties in this case, will not have imposed a test or device for a ten-year period and may therefore also seek to exempt themselves from the requirements of Sections 4 and 5. Of course, a covered State or subdivision may seek an earlier exemption—as New York did in this case—by bringing an action for a declaratory judgment under Section 4(a) on the basis that the literacy test it had employed in the preceding ten years did not deny the right to vote, rather than on the basis that it had not imposed any test or device at all during that period.

In this case we believe the district court acted within its discretion in denying appellants' motion to intervene. We do not contend that intervention as of right under Rule 24(a), Fed. R. Civ. P., is entirely precluded in Section 4(a) declaratory judgment actions although there is legislative history to support that view. Rather our position is that in light of the timing of appellants' motion to intervene and the nature of the allegations there made, the district court properly refused to allow intervention in the particular circumstances of this case.

Appellants' asserted interest in this case is the same as that represented by the Attorney General: to ensure that the right to vote will not be denied on account of race or color. That appellant filed a Section 5 action against the New York City Board of Elections a few hours before they sought intervention here does not alter the nature of their interest in this case since private Section 5 actions are themselves suits to enforce the public interest brought by "private attorneys general" to supplement the enforcement power of the Attorney General.

While intervention as of right may nevertheless be permitted in this situation, it is necessary under Rule 24(a)(2) for the applicant to show that the Attorney General is not adequately representing the public interest. In their brief in this Court, appellants attempt to make such a showing by setting forth quite serious charges alleging that the Justice Department was intentionally derelict in its investigation with respect to New York's Section 4(a) complaint, and that it capitulated. Yet none of these charges is contained in appellants' motion to intervene or their accompanying papers—all that was before the district court when it denied intervention; they are, therefore, not properly before this Court.

The only supposed defect in the investigation appellants brought to the district court's attention when they sought intervention was the failure of three Justice Department attorneys at any time to ask appellants' counsel whether he had information to

provide. Yet appellants' counsel never offered such information and, as we note below, p. 35, *infra*, it now appears that he was in New Hampshire during the months the government conducted its investigation and did not even begin working for the NAACP Legal Defense and Education Fund, Inc., until March 9, 1972, when he apparently moved to New York City. Moreover, although appellants argue in their brief, on the basis of an affidavit of their counsel, that they were never interviewed during the investigations, appellants now admit that at least two of them were in fact interviewed by government attorneys in the course of the government's investigation, see p. 36, *infra*.

Thus, what appellants' motion to intervene and their claim of inadequate representation come down to is simply this: they do not agree with the Attorney General's conclusion about what the public interest demands in this case. But that does not show inadequate representation by the Attorney General, and the district court properly denied intervention particularly in light of the lateness of appellant's motion to intervene.

Rule 24(a) requires that a motion to intervene be "timely" filed. This action had been pending for more than four months, but it was not until the eve of judgment, after the government had filed its consent, that appellants sought to intervene. Yet on no occasion during the preceding four months did appel-

lants offer any evidence or information to the Attorney General regarding why New York's complaint should be opposed. Appellants' counsel sought to justify their late filing by stating, in an affidavit, that he had no knowledge of this case prior to March 21, 1972. But this is irrelevant in any event, especially since he was in New Hampshire prior to that time and did not begin working in his present employment until March 9, 1972. Appellants' counsel also stated that "to the best of my knowledge" none of the appellants knew of the case, despite the publicity it had received. But this does not say whether counsel even asked the five individual appellants whether they knew about this action, and we are now told that, contrary to representations made below and in this Court, at least two of them were in fact interviewed by government investigators as early as January 1972. As to appellant NAACP, it nowhere appears on what basis appellants' counsel came to his conclusion that this organization was unaware of this case and the district court could properly conclude that the interested members or officers of appellant NAACP should have had knowledge—or, at minimum, were on notice—of New York's Section 4(a) action. The district court acted within its discretion in denying intervention, particularly since allowing intervention at this stage would have disrupted and possibly precluded New York's impending primary elections.

ARGUMENT

THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN
DENYING APPELLANTS' MOTION TO INTERVENE

Aside from the jurisdiction question,¹⁵ the only issue in this case is whether the three-judge district court erred in denying appellants' motion to intervene. As noted above, the United States filed no response to appellants' motion (p. 10, *supra*). We believe, however, that in view of the timing of the motion and the claims made by appellants at that stage, the decision whether to allow intervention was a matter within the discretion of the district court and that, in the circumstances of this case, the district court did not abuse its discretion in denying intervention.

We do not argue that intervention as of right under Rule 24(a), Fed. R. Civ. P., is entirely prohibited in declaratory judgment actions under Section 4(a) of the Act, although there is legislative history to support that view. During the 1965 hearings on the Act, Attorney General Katzenbach, when asked whether an individual could intervene and present evidence in a Section 4(a) declaratory judgment action, replied:¹⁶

¹⁵ Since we substantially agree with appellants' position, set forth at pp. 13-16 of their brief, that this Court has jurisdiction to review the denial of intervention below and that if it agrees that intervention was properly denied this Court should affirm rather than dismiss for lack of jurisdiction (see our Motion to Affirm in *Synsfy Enterprises v. United States*, No. 70-329, affirmed, 404 U.S. 802), we have not separately discussed the question of jurisdiction in our brief.

¹⁶ *Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee of the Judiciary, 80th Cong., 1st Sess., 90-91 (1965) [hereafter House Hearings].*

Mr. Katzenbach: I would think that there was no right of intervention on the part of an individual, but I suppose individuals could intervene with the consent of the court.

Mr. Copenhaver: And, thereby, declaratory judgment action could possibly be, in contrast to a very short, quick proceeding, a very long proceeding.

Mr. Katzenbach: Yes, I think that is conceivable. I would imagine that if the United States was opposed to the declaratory judgment that was sought, the court would suggest that the people discriminated against make their evidence available to the Department of Justice. I would suppose that if the Department of Justice had no such evidence and was unable to obtain such evidence, then the court might conceivably permit persons to intervene. I would be skeptical that the court in general would allow individual intervention in such a case.

In 1966, the three-judge district court in *Apache County v. United States*, 256 F. Supp. 903 (D. D.C.), the first of the six declaratory judgment actions under Section 4(a) since passage of the Act in 1965,¹⁷ came

¹⁷ The cases are: *Apache County v. United States*, 256 F. Supp. 903 (D. D.C., 1966); *Alaska v. United States* (D. D.C., C.A. No. 101-66, judgment entered August 17, 1966, and C.A. No. 2122-71, judgment entered March 10, 1972); *Elmore County, Idaho v. United States* (D. D.C., C.A. No. 320-66), judgment entered September 22, 1966; *Wake County, North Carolina v. United States* (D. D.C., C.A. No. 1198-66), judgment entered January 23, 1967; *Gaston County, North Carolina v. United States*, 288 F. Supp. 678 (D. D.C., 1968), affirmed, 395 U.S. 283 (1969); *New York v. United States* (D. D.C., C.A. No. 2419-71), judgment entered April 13, 1972.

to a conclusion similar to that of Attorney General Katzenbach. Judge Leventhal, speaking for the court, there held that there can be no intervention as of right under Rule 24(a) in these actions since individual applicants cannot show "the equivalent of being legally bound" by the decree in the case; "in Section 4(a) cases a declaratory judgment would have no legally binding effect with respect to an individual's private interest since he would still be able to prosecute a private action to protect his right to vote. (256 F. Supp. at 907). The court indicated, however, that there may be appropriate situations in which permissive intervention under Rule 24(b) should be allowed (*id.* at 908).

The testimony of Attorney General Katzenbach in 1965 and the decision in *Apache County* in 1966, however, must be considered in light of the fact that Rule 24(a) has subsequently been revised. Prior to July 1, 1966, when the amendments to the Rule became effective, an applicant for intervention as of right under Rule 24(a)(2) had to show not only that the representation of his interest in the action is or may be inadequate, but also that he "is or may be bound by a judgment in the action." See 3B *Moore's Federal Practice* ¶24.08 (2d ed. 1969). In contrast, the amended version of Rule 24(a)(2)¹⁸ now provides

¹⁸ The court quoted *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 694.

¹⁹ Appellants have not claimed that the Voting Rights Act confers upon them "an unconditional right to intervene," as is required by Rule 24(a)(1).

that upon timely application a person has a right to intervene when he claims an interest relating to the subject matter of the dispute such that disposition of the action "may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Although the revisions to Rule 24(a) thus relax the requirement that the applicant be bound under the doctrine of *res judicata*, the nature of the applicant's interest required for intervention as of right remains unchanged by the amendments,²⁰ and, in that respect, both *Apache County* and Attorney General Katzenbach's testimony are still significant.

²⁰ See 3B *Moore's Federal Practice, supra*, at ¶ 24.09-1[2]; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 *Harv. L. Rev.* 356, 405 (1967) (the author served as reporter to the Advisory Committee on Civil Rules from 1960 to July 1, 1966, *id.* at 356, n. *); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 380 U.S. 129, 153-154 (Mr. Justice Stewart, joined by Mr. Justice Harlan, dissenting). See also *Hobson v. Hansen*, 44 F.R.D. 18, 24 (D. D.C.):

"[W]hile one's interests need no longer be decisively affected before intervention will be allowed, there is nothing in the new rule or in its attendant commentary to indicate that it effected a change in the kind of interest required. Thus the thrust of the revision seems clearly to be concerned with [the] adequacy of representation and not with any notion of expanding the types of interests that will satisfy the rule. Still required for intervention is a direct, substantial, legally protectable interest in the proceedings."

A. APPELLANTS' INTEREST IN THIS CASE IS NOT DIFFERENT FROM THE PUBLIC INTEREST IN PREVENTING THE DENIAL OF THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR, WHICH IS THE INTEREST REPRESENTED BY THE ATTORNEY GENERAL UNDER THE ACT

In their Motion to Intervene in this case, appellants claimed an interest in this action on the basis that a few hours earlier they had brought suit against the New York City Board of Elections seeking to enjoin implementation of the State's reapportionment Acts because this legislation had not yet been submitted to the Attorney General for clearance under Section 5 of the Voting Rights Act (App. 45a-46a; see Appellants' Brief, at 22-26). As we noted above, p. 9, *supra*, the question whether Section 5 applies to State reapportionment legislation is now before this Court in *Georgia v. United States*, No. 72-75, probable jurisdiction noted, October 16, 1972, where the United States has argued that the Section 5 clearance procedures do apply to such legislation.²¹

Assuming *arguendo* that this Court will agree with us in the *Georgia* case, we submit that appellants' Section 5 action nevertheless does not confer upon them any special interest in this case distinct from the public interest represented by the Attorney General.²² Their Section 5 action is merely derivative; it

²¹ We have supplied counsel for appellants and counsel for the State of New York with copies of our brief in the *Georgia* case.

²² Of course, if this Court rules in the *Georgia* case that reapportionment legislation is not covered by Section 5 then appellants' Section 5 action would not even be in vindication of the public's interest of ensuring compliance with the Act.

may be maintained only so long as the three Counties involved in this case properly remain subject to Section 4 of the Act since Section 5 applies only to States and subdivisions covered by Section 4. See pp. 12 to 14, *supra*. Indeed, in a Section 5 suit brought by individual citizens, such as that instituted by appellants here, individuals act on behalf of the public interest as private attorneys general. This was the basis for the holding in *Allen v. State Board of Elections*, 393 U.S. 544, 554-557, that despite the Act's failure to provide a private right of action, private citizens could sue—as appellants have done—to require new enactments to be submitted for clearance under Section 5; in light of the Attorney General's limited resources, such private actions provide a necessary supplement to governmental enforcement of Section 5.

Therefore, appellants' nearly simultaneous filing of the Section 5 action did not transform the nature of their interest in this case into anything distinguishable from the general public interest embodied in the Act and represented by the Attorney General on behalf of the United States in ensuring that members of minority groups will not be denied the right to vote on account of race or color. Indeed, appellants virtually concede as much in their brief, at p. 48, where they argue that "private parties may step forward and seek to indicate their own and the public interest when dissatisfied with the government's handling of a case in which they have a substantial interest."

Likewise, appellants' assertion of a "more general interest in retaining the safeguards of sections 4 and 5"²² does not differentiate their interest from that represented by the Attorney General, particularly since it does not appear that any of the individual appellants have ever been denied the right to vote in New York, by literacy tests or otherwise, on account of race or color.²³ As Judge Leventhal stated for the court in *Apache County v. United States*, *supra*, 256 F. Supp. at 906:

But the right enforced by * * * [the remedies in the Voting Rights Act] is a public right, appertaining not to individual citizens, but to the United States itself—called upon by Congress, in implementing the Fifteenth Amendment, to vindicate the right of all citizens of the United States collectively to be free from discrimination in any part of the United States on account of race or color. This public right and remedy are supplementary to but analytically distinct from the individual rights of those discriminated against by or in the areas involved.

²² Appellants' Brief, at 23. In their Motion to Intervene (App. 44a-46a), appellants relied mainly on their Section 5 action against the New York City Board of Elections and did not articulate any other interest in this case aside from the quite apparent observation that if New York prevailed in its declaratory judgment suit for an exemption, the protections of the Act would no longer apply.

²³ The individual appellants describe themselves as "duly qualified" voters in Kings County, New York (App. 44a), and three of the five (Wright, Stewart and Fortune) are members of the state legislature (*ibid.*).

B. APPELLANTS' ALLEGATIONS IN THEIR MOTION TO INTERVENE FALL SHORT OF INDICATING THAT THE ATTORNEY GENERAL WAS NOT ADEQUATELY REPRESENTING THE PUBLIC INTEREST, WHICH APPELLANTS MUST SHOW IN ORDER TO INTERVENE UNDER RULE 24(a) (2)

Although appellants' interest in this case is thus in substance similar to that of the public at large, which the Attorney General represents, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, if not limited to antitrust cases or cases involving alleged non-compliance with a prior judicial decree, may indicate that there nevertheless can be intervention as of right under Rule 24(a) (2) when the government's representation of the public interest has been inadequate. In *Cascade*, this Court upheld the right of others to intervene in a government civil antitrust suit after a negotiated settlement had been presented to the district court for approval as a final decree. This Court apparently believed that the government had not adequately represented the public interest because the proposed decree differed significantly from this Court's mandate ordering divestiture, which had been issued at an earlier stage of the proceedings (*United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 662). See 386 U.S. at 131, 136-143; *id.* at 154-159 (Mr. Justice Stewart, joined by Mr. Justice Harlan, dissenting).²³

²³ See *The Supreme Court, 1966 Term*, 81 Harv. L. Rev. 69, 221-223 (1967); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 741-743 (1968); cf. Kaplan, *supra*, note 20, 81 Harv. L. Rev. at 406.

However, as the court held in *Apache County, supra*, 256 F. Supp. at 908, with respect to actions for declaratory judgments under Section 4(a) of the Voting Rights Act,

Congress assigned to the Attorney General the primary role in vindicating the public interest under the Act. We should be reluctant indeed to permit intervention in a section 4(a) action in the absence of a plausible claim that the Attorney General is not adequately performing his statutory function, and that intervention is needed to enable the court properly to perform its declaratory function or in some other way to protect the public interest.

This, we believe, correctly indicates that in Section 4(a) actions the mere claim that the Attorney General has not sufficiently represented the public interest does not entitle the applicant to intervention as of right, nor does the mere assertion of a different theory of the public interest. See Attorney General Katzenbach's testimony, quoted at p. 22, *supra*.

Trbovich v. United Mine Workers, 404 U.S. 528, on which appellants rely,²⁶ is not to the contrary. This Court there stated that an applicant for intervention as of right under Rule 24(a) is required to show only that the representation of his interest "may be" inadequate and that the applicant's burden in this respect should be treated as "minimal." 404 U.S. at 538, n. 10. However, the applicant for intervention in *Trbovich* asserted a personal interest in the action, which could have been at odds with the public interest

²⁶ Appellants' Brief, at 26.

represented by the government; the Court held that even though the government is adequately representing the public interest, intervention under Rule 24(a) is proper when the applicant has a "valid complaint" about the government's representation of his private interest.²⁷

In contrast to *Trbovich*, the appellants here have claimed no special interest of their own that is distinct from the general public interest expressed by the Voting Rights Act in preventing racial discrimination in voting qualifications. And in order to permit intervention as of right in these circumstances a court would have to reach the "somber conclusion"²⁸—unnecessary to reach in the *Trbovich* situation—that the Attorney General had not adequately represented the public interest. This is a conclusion that should not be lightly made.

1. THE TIMING OF APPELLANTS' MOTION TO INTERVENE WAS RELEVANT IN ASSESSING THE ADEQUACY OF APPELLANTS' ALLEGATIONS REGARDING THE ATTORNEY GENERAL'S REPRESENTATION OF THE PUBLIC INTEREST.

Rule 24(a) provides for "Intervention of Right" only "Upon timely application * * *." Therefore, in assessing an applicant's claim of inadequate representation of the public interest in Section 4(a) cases, the trial court must take into account not only the

²⁷ 404 U.S. at 539 ("Even if the Secretary [of Labor] is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer'").

²⁸ Kaplan, *supra*, note 20, 81 Harv. L. Rev. at 406.

nature of the allegations made in the motion to intervene but also the timing of that motion. If the motion is not filed until the end of the litigation, the applicant should be required to make a more substantial showing of inadequacy because, at that stage, allowing intervention is much more likely to disrupt the plaintiff-State's election processes.

To this extent, the requirement in Rule 24(a) that the motion for intervention be "timely" converges with the requirement that the applicant show inadequate representation of the public interest. Where, as here (see pp. 41-47, *infra*), the motion to intervene presents a serious question of timeliness, the matter thus becomes one that must be substantially entrusted to the trial court's discretion, even though Rule 24(a) speaks in terms of a "right" to intervene. Indeed, one commentator has concluded that whenever a motion for intervention as of right is based on the inadequacy of the government's representation, there should be²⁰

express recognition of the discretionary nature of the judgment, of the interrelationship of the many factors involved [in determining whether to allow intervention as of right], and of the difficulty of focusing in advance on any one or two controlling considerations. Recognition that

²⁰ Shapiro, note 20, *supra*, 81 Harv. L. Rev. at 759; see also *id.* at 746.

Professor Shapiro notes, however, two situations in which the trial court should have no discretion to refuse intervention: (1) where the applicant would qualify for joinder under Rule 19(a) (2) (i); and (2) where the applicant seeks to intervene in a class action and he is a member of the class and the representation of his interest is not adequate. *Id.* at 758-759. Neither of these situations is present here.

the matter is one of discretion of course, should not and need not mean an abdication of the reviewing function. But it does suggest that there will be many instances in which a decision either way will be acceptable—instances in which *the appellate court should not substitute its judgment for that of the trial court.* [Emphasis added.]

We believe that in this case the district court properly exercised its discretion in denying appellants' motion to intervene in light of the timing of the motion and appellants' allegations therein.

2. APPELLANTS' MOTION TO INTERVENE DID NOT PRESENT THE DISTRICT COURT WITH ANY BASIS FOR CONCLUDING THAT THE ATTORNEY GENERAL HAD NOT ADEQUATELY REPRESENTED THE PUBLIC INTEREST.

A considerable portion of appellants' brief in this Court is devoted to an attempt to show that the Attorney General did not adequately represent the public interest in ensuring that persons are not denied the right to vote on account of race or color (Appellants' Brief, at 26-36). Whether intended merely as hyperbole or not, appellants have advanced a number of quite serious accusations. They charge that the investigation of New York's complaint by attorneys in the Civil Rights Division of the Justice Department was "well calculated to reveal nothing" of significance (*id.* at 29); that the "results of this investigation were predictably barren" (*ibid.*); that the govern-

ment attorneys' alleged failure to investigate significant discrimination is "inexplicable and unjustifiable" (*ibid.*); that "investigations and theories" were "deliberately not pursued" (*ibid.*); that the government's position below was a "capitulation" (*id.* at 27); that this was an "abortive investigation" (*id.* at 21); and that the Attorney General did not even ask the district ^{court} to retain jurisdiction over the case for the next five years although such a "precautionary measure is mandatory under section 4" (*id.* at 27).³⁰

If this Court is to determine whether the district court erred in refusing intervention in light of the foregoing accusations, as appellants obviously contemplate, then the court's denial of intervention should be affirmed. For not a single one of these charges was before the district court when it denied appellants' motion to intervene (see App. 44a-51a)—a point nowhere mentioned in appellants' brief in this Court.³¹

The only alleged "defect" in the government's investigation that appellants alluded to in their Motion

³⁰ Such a request is obviously unnecessary since Section 4(n) directs that "[t]he court *shall* retain jurisdiction * * * for five years after judgment" (emphasis added); this is mandatory and there is no requirement that the Attorney General request the court to retain jurisdiction.

³¹ In their Motion to Alter Judgment filed after the district court had denied intervention and entered a declaratory judgment for New York, appellants said only that the United States should have "undertake[n] a more thorough investigation" (App. 74a) apparently with respect to educational inequality (see App. 89a-90a ["Points and Authorities"]). The court denied this motion one day later, on April 25, 1972, before New York or the United States had an opportunity to respond.

to Intervene²² was that at no time did any of the three Justice Department attorneys whom appellants' counsel had telephoned on March 23, 29, and April 3, 1972,²³ "inquire of counsel for petitioners whether he or any of the petitioners had information or evidence which would" show that New York was not entitled to a declaratory judgment under Section 4(a) (App. 46a).²⁴ Of course, this does not say whether other government attorneys made such inquiries or whether appellants' counsel even had any information to provide; and it implicitly admits that appellants' attorney never offered these government attorneys any information about New York's use of literacy tests.

²² Their Motion to Intervene (App. 44a-47a), accompanied by an affidavit from their attorney (App. 48a-51a), also discusses their action against the New York City Board of Elections (see pp. 25-26, *supra*), which had been brought a few hours earlier (App. 92a), and alleges that government attorneys misled appellants' counsel into believing that the Attorney General would not consent to New York's motion for summary judgment—a contention we discuss *infra*, at pp. 46-47.

²³ See p. 9, *supra*.

²⁴ Appellants' counsel, Eric Schnapper, stated in his affidavit, filed with the Motion to Intervene, that (App. 51a): "At no time did any of these three attorneys inquire whether I or petitioners had any evidence as to whether New York or officials in Kings, Bronx or New York counties had ever used a test or device, as defined in 42 U.S.C. § 1973b, with the purpose or the effect of denying or abridging the right to vote on account of race or color."

More important, there would have been no reason for the government, during the course of its investigation from December 1971 to March 1972, to make any such inquiries of appellants' counsel, Eric Schnapper. In an affidavit filed after the court had denied intervention, Mr. Schnapper stated that "[t]hroughout the months of December, 1971 and January and February, 1972, I was in the state of New Hampshire" (App. 91a).

In any event, Mr. Schnapper has now informed us that he did not begin his employment as an attorney with the NAACP Legal Defense and Education Fund, Inc., until March 9, 1972,³⁵ apparently after he moved from New Hampshire and three months after New York filed this action. It is therefore still more apparent why Mr. Schnapper was never "interviewed or even informed by the Justice Department that any investigation was underway" (Appellants' Brief, at 28-29).

As to the individual appellants, their Motion to Intervene nowhere alleges that *they* had not been asked to provide information, but states only that three government attorneys had not requested their

³⁵ Mr. Schnapper has agreed that we should disclose this fact to the Court.

counsel to supply information from them. (Again, there is no indication that the individual appellants in fact had relevant information to provide or that they ever offered this to the government.) While this is of dubious significance to the adequacy of the government's representation since any failure to interview these particular appellants or their counsel scarcely indicates that the government's investigation had not been faithfully and diligently pursued, it is in any event now apparent that appellants' allegations that they were never interviewed about this case (Brief, at 28-29; App. 51a, 91a [affidavit of Eric Schnapper]) are not accurate. Their attorney, Mr. Schnapper, has agreed to the following statement: Appellants' counsel recently discovered that Justice Department attorneys in fact met with appellants Stewart and Fortune in January 1972 during the course of their investigation; although the Justice Department attorneys recall informing Stewart and Fortune that this case was pending, neither Stewart nor Fortune can remember being so informed.

All that remains in regard to the Motion to Intervene is appellants' assertion that the United States is not adequately representing their interests because, if New York's motion for a declaratory judgment

ment were granted, appellants' Section 5 complaint against the New York City Board of Elections, filed earlier the same day, would fail (App. 46a-47a). But this in no way indicates that the Attorney General's representation in the instant case was, or even might have been, inadequate. As we previously discussed, pp. 25 to 27, *supra*, Section 5 requires States and subdivisions covered by Section 4 to submit new legislation affecting voting qualifications to the Attorney General for 'clearance. A private action under Section 5, such as appellants', supplements the enforcement power of the Attorney General, as this Court held in *Allen v. State Board of Elections*, *supra*, 393 U.S. at 556-557. But the circumstance that it is instituted by private parties rather than the Attorney General does not alter the fact that the interest at stake is that of protecting minority groups from racial discrimination in voting qualifications—the public interest that the Act itself directs the Attorney General to represent. See *Apache County v. United States*, *supra*, 256 F. Supp. at 908, quoted on p. 27, *supra*.

That appellants disagree with the Attorney General's decision to consent to New York's motion for

a declaratory judgment does not show that the Attorney General failed to represent the public interest adequately. Appellants' argument to the contrary, based on their Section 5 suit, is merely a bootstrap contention. The situation here is the same as if private individuals sued in the morning to enforce, on behalf of the public interest, a preliminary decree in a government suit and then claimed in the afternoon that they are entitled to intervene in the main action because the government had earlier consented to the entry of a judgment that would end their derivative suit.

Thus, we submit that appellants did not present the district court with any substantial basis for concluding that they should be allowed to intervene as of right on the ground that the Attorney General had not adequately represented the public interest. And as we argue below this deficiency in appellants' motion together with the lateness of its filing show that the district court properly exercised its discretion in denying intervention.

3. THE ATTORNEY GENERAL PROPERLY PERFORMED HIS DUTY UNDER THE ACT BY FILING A CONSENT TO THE DECLARATORY JUDGMENT AND AN ACCOMPANYING AFFIDAVIT.

Before discussing the timeliness point, however, we are constrained to respond to appellants' suggestions—in their brief in this Court³⁶ but not in their Motion to Intervene or accompanying papers in the district

³⁶ See, *e.g.*, Appellants' Brief, at 27, 42-43.

court²⁷—of impropriety in the manner in which the Attorney General consented to the judgment below by filing a memorandum and an affidavit stating in part that, on the basis of an investigation, there was no reason to believe that the Counties had imposed literacy tests in the last ten years with the purpose or effect of denying the right to vote on account of race or color.²⁸

The Act itself requires that if the Attorney General determines that he has no such reason to believe “he shall consent to the entry of [a declaratory] judgment” under Section 4(a), 42 U.S.C. 1973b(a). See pp. 15–16, *supra*. And the procedure followed by the Attorney General here is precisely what was contemplated, as the following testimony by Attorney General Katzenbach during the 1965 Senate and House hearings clearly indicates:

Attorney General Katzenbach: Senator, I think this law, like any other law, takes in the normal practices that go on in court.

Senator Ervin: Oh, no, it reverses them. That is one of my objections to it. It turns them around. It requires the State or political subdivision to establish its innocence, complete innocence.

Attorney General Katzenbach: Senator, if you were, as you were, a distinguished judge and a petitioner came in for a declaratory judgment and the petitioner came in simply with a [sic] affidavit of the Governor of the State, and said he knew of no instance of discrimination by any

²⁷ App. 44a–47a, 48–51a, 63a–66a.

²⁸ App. 39a–43a.

State official under color of law that had the effect of denying or abridging the right to vote within his State for a 10-year period, and the Government of the United States, as the defendant in this, came in and offered no evidence whatsoever that there ever had been—I just put that case to you—they came in and did it. Would you not give them a declaratory judgment? I would.

Attorney General Katzenbach: They have to allege it. That is all they have to do. Then the court, on the basis of whatever evidence it has, makes the determination. There is no evidence to the contrary. I do not see how they could fail to make the determination that would be required.

In fact, it seems to me that just on those pleadings, there could be a summary judgment without actually putting in any evidence, any witnesses, or anything more.

Senator Ervin: Well, why—

Attorney General Katzenbach: You can ask for a summary judgment on the pleading. They allege no discrimination, the United States has no evidence of discrimination—boom, summary judgment for the State or for the county.”

Mr. Cramer: Isn't it an almost impossible burden to show 10 years of nondiscrimination?

²² *Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 49-51 (1965).*

Mr. Katzenbach: I don't think it is an impossible burden for a State that has not discriminated. Where people have not been discriminated against, I think it would be pretty simple. Actually, all you have to do is come into court and say that you have not discriminated and then if the Department of Justice does not have evidence that you have, that is probably the end of the matter. I would think that you could shift the burden of going forward with the evidence by a simple affidavit from the appropriate officials that there had been no discrimination.

The Department of Justice would have to put on whatever evidence it had of discrimination and that evidence would have to be rebutted if that were possible by the State involved. It does not seem to me very complicated."

C. APPELLANTS' MOTION TO INTERVENE WAS NOT TIMELY FILED AS RULE 24 REQUIRES AND APPELLANTS HAVE OFFERED NO VAILD JUSTIFICATION FOR THEIR FAILURE TO ACT EARLIER BY SUPPLYING THE GOVERNMENT WITH INFORMATION ABOUT DISCRIMINATION IN VOTING IN THE THREE COUNTIES

One prerequisite to intervention as of right under Rule 24(a)(2) is that the application to intervene be "timely." We believe that in this case the district court acted well within its discretion in denying appellants' motion to intervene in light of the lateness of its filing and the insufficiency of the allegations contained therein.

⁴⁰ House Hearings 92-93.

New York commenced this action on December 3, 1971, yet appellants did not seek intervention until April 7, 1972, after the United States had consented to the entry of a declaratory judgment, which the court entered on April 13, 1972 (App. 1a, 39a, 44a-47a, 71a-72a). In opposition to appellants' motion to intervene, counsel for the State of New York filed an affidavit on April 12, 1972, pointing out that this action had been pending for more than four months, that appellants were clearly on notice of the action in view of the newspaper publicity it had received, and that appellants at no time during this period had presented, or offered to present, any evidence—if they had any—regarding whether and how the three Counties had used literacy tests to deny the right to vote on account of race or color (App. 67a-68a).

After the court denied intervention, appellants' counsel, Eric Schnapper, apparently believing that the court had based its decision on the timeliness issue, filed an affidavit stating that prior to March 21, 1972, he had no knowledge of this action and that "[t]o the best of my knowledge neither my co-counsel nor any of the applicants for intervention knew of the commencement, pendency or existence of this action prior to March 21, 1972" (App. 91a). Relying on this affidavit, appellants argue in their brief in this Court, at p. 40,⁴¹ that it would not have been reasonable to require them to seek intervention earlier since they had not known of this case. We deal first with this contention and then discuss appellants' further

⁴¹ See also p. 40, n. 56.

attempts to justify their late filing, including the claim that Mr. Schnapper had been misled by Justice Department attorneys (Appellants' Brief, at 37-38).

To begin, it is difficult to understand the relevance of Mr. Schnapper's lack of knowledge of the pendency of this action: he is merely acting as counsel for the individual appellants and appellant NAACP, and the significant question would appear to be whether these appellants—not Mr. Schnapper—had or should have had such knowledge. In any event, as we noted above, p. 35, *supra*, Mr. Schnapper did not begin working for the NAACP Legal Defense and Education Fund, Inc., which represents the NAACP in legal matters, until March 9, 1972, and before that time was living in New Hampshire (App. 91a). That Mr. Schnapper did not become aware of this suit until March 21, 1972, is therefore no justification for the timing of appellants' motion to intervene.

As to the individual appellants, Mr. Schnapper says only that to the "best of my knowledge" they were not aware of the case before March (App. 91a). But it does not appear whether Mr. Schnapper ever asked his clients about this or whether they read the newspaper articles about the case. And it now appears that at least two of the individual appellants in fact were interviewed in January 1972 by government attorneys investigating New York's complaint, see pp. 36-37, *supra*.⁴²

⁴² Compare App. 51a; Appellants' Brief, at 28-29.

Moreover, with respect to appellant NAACP, New York Branch, it nowhere appears how appellants' counsel came to his implied conclusion that this organization was unaware of the pendency of this case." In light of the New York Times article referred to in the affidavit of New York's attorney in opposition to intervention (App. 67a), we submit that the district court could properly conclude that, at a minimum, the NAACP was on notice of New York's Section 4(a) complaint.

While appellants argue that they sought to intervene at the first possible moment, they did not assert that either during or after the investigation they had offered evidence to the government about discrimination in voting by the use of literacy tests in these three Counties." In light of this and the nature of the excuses offered by appellants for the timing of their motion, the last of which we discuss below, *infra*, p. 45, together with their failure to allege any substantial basis to support the conclusion that the Attorney General had given inadequate representation, we believe the district court

"For example Mr. Schnapper's affidavit does not say whether he polled the individual members or officers of the NAACP Branch or otherwise inquired of them about their knowledge of this action.

"See Attorney General Katzenbach's testimony in *House Hearings* 91:

"Mr. Copenhaver: May I say if the party is unable to intervene by court permission, he would come to the Attorney General and the Attorney General could present that [the person's evidence of discrimination] before the court?

Mr. Katzenbach: Yes."

acted within its discretion in denying intervention, particularly since allowing intervention at that stage would have disrupted and possibly precluded the selection of candidates for Congress and state office and the selection of delegates to the Democratic National Convention in view of the coming primary elections in New York scheduled for June 20, 1972, as the State of New York pointed out below (App. 69a-70a) and argues in its brief in this Court, at pp. 10-12."

Finally, the only other excuse offered by appellants for seeking intervention at the eleventh hour is, as they assert in their brief in this Court, at p. 37, that "on March 23, 29 and April 3, [1972,] three different Justice Department attorneys assured counsel for the NAACP [Eric Schnapper] that the United States would oppose New York's motion for summary judgment." (See App. 46a-47a [Motion to Intervene]; App. 48a-51a [Affidavit of Eric Schnapper].) From this appellants argue that their motion to intervene should not be considered untimely because that would

"For these reasons the court also acted within its discretion in denying appellants' Motion to Alter Judgment filed on April 24, 1972, after the court had denied intervention on April 13, 1972 (App. 73a-74a, 117a-118a).

Moreover, appellants would not have been automatically entitled to permissive intervention under Rule 24(b), as they now suggest in this Court (Brief at p. 26, n. 39) since—in the language of Rule 24(b)—intervention at that stage would have "unduly delay[ed] or prejudice[d] the adjudication of the rights of the original parties" in light of New York's scheduled primary elections.

require the filing of precautionary motions to intervene before the applicant for intervention knew the United States would not give adequate representation to the public interest (Appellants' Brief, at 40-41). Appellants further contend that even if they had sought intervention earlier the court could not have decided whether to grant their motion at that time (*id.* at 41).

In our view, however, these arguments are beside the point in the circumstances of this case. For here it appears that appellants did nothing for four months while the action was pending; they did not assert that they offered evidence or information to the government at any time, although before this Court—but not in their Motion to Intervene—they now charge the government with being derelict in its investigation. Appellants should not be entitled to sit by for four months while the complaint is pending and the government is pursuing its investigation and then appear on the eve of judgment to seek intervention on the basis that they are interested in this case, would like to prevent New York from implementing reapportionment according to the 1970 census, and disagree with the Attorney General's view of the public interest.

Moreover, as we stated in our Motion to Dismiss or Affirm, at p. 4, n. 3, we were not called upon in the district court to present evidence in regard to the allegation of appellants' counsel that government attorneys told him the Attorney General would not consent to a declaratory judgment,⁴⁶ but it is our position

⁴⁶ Affidavit of Eric Schnapper (App. 48a-51a).

that the statements of appellants' counsel are not an accurate representation of the conversations between him and these government attorneys. While this Court is not the appropriate place to present evidence on this question, we will, if appropriate and relevant, present such evidence in the district court should any further hearing be deemed necessary.

In view of the other factors we have discussed above, however, we believe that the district court properly exercised its discretion in refusing to grant appellants' motion to intervene.

CONCLUSION

For the foregoing reasons, the orders of the district court denying appellants' motions to intervene and to alter judgment should be affirmed. See *Syufy Enterprises v. United States*, 404 U.S. 802.

Respectfully submitted.

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FEBRUARY 1973.

FILE COPY

Supreme Court, U. S.

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MICHAEL RODAK, JR., C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-129

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, *etc.*, *et al.*,

Appellants,

—v.—

NEW YORK, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

Adequacy of Government Investigation

The United States urges in its brief that applicants for intervention did not contend in the District Court that the Department of Justice's investigation was inadequate. (United States brief pp. 18, 33). The Points and Authorities filed by applicants in support of their motion to intervene, set out in the appendix hereto, urged:

The second criterion [warranting intervention] is the failure [of] the Attorney General to discharge his responsibilities . . . to investigate the relevant facts. The most important factor to be considered in judg-

ing whether literacy tests discriminate on the basis of race or color is whether there are differences in the literacy rates of whites and non-whites, particularly if they are [due] to unequal or discriminatory public education. Applicants have alleged just such differences, inequality and discrimination in their proposed [answer], but it appears from the affidavit of Mr. Norman that the United States at no time inquired whether similar facts to those found in *Gaston County* might have existed in New York at the time when today's illiterate non-white adults were children. The factual investigation vaguely described in Mr. Norman's affidavit falls far short of the thorough investigation in *Apache County*. . . . The United States has declined to make a meaningful investigation into the relevant facts. . . . (Appendix, p. 2ra)

The allegations referred to in the proposed answer concerning illiteracy and unequal education claim discrimination against minority children in both the schools of New York and the schools in southern states from which many had emigrated. (Pp. 65a-66a) The proposed answer also urged that non-whites were deterred from seeking to register. (P. 65a) These are, of course, the very types of discrimination which prompted Congress to pass the Cooper Amendment and which applicants urge on appeal. In their Points and Authorities in support of the Motion to Alter Judgment, applicants again renewed their criticism of the adequacy of the government's investigation.

It is even more apparent from the papers in this case that the United States has been derelict in its fact finding responsibility. . . . It is clear from the record in this action that the United States, which inquired with such diligence into literacy rates and educational discrimination when sued by *Gaston County* in 1966,

made absolutely no such inquiry when sued by the state of New York in 1971. (Pp. 89a-90a)

Applicants' proposed answer, together with their Points and Authorities, gave appellees "fair notice" of the defenses applicants sought to assert and the inadequacies which they claimed tainted the government's investigation, *Conley v. Gibson*, 355 U.S. 41, 47 (1957), and all the allegations of applicants' proposed pleading must be deemed to be true. *Kaufman v. Wolfson*, 137 F. Supp. 479 (S.D. N.Y., 1956). The inadequacy of the Justice Department's investigation was clearly urged as a ground for intervention in the District Court and can and should be considered on appeal.¹

The United States maintains that applicants' basic grievance with the Department's investigation and consent to

¹ Subsequent to the filing of applicants' brief in this Court, counsel was advised by the United States that Justice Department records indicated that government attorneys had met with two of the applicants in 1972. When investigation by counsel for applicants confirmed that this meeting had taken place, counsel for applicants and the United States agreed upon the following statement:

"Appellants' counsel recently discovered that Justice Department attorneys met with appellants Stewart and Fortune in January, 1972 during the course of their investigation; although the Justice Department attorneys recall informing Stewart and Fortune that this case was pending, neither Stewart nor Fortune can remember being so informed."

Applicants maintain that this meeting did not constitute any legally relevant notice, that it did not involve anything which might be characterized as an interview, that it does not justify the government's statements to applicants' counsel in March and April, 1972, and that it cannot be resorted to at this late date to support the adequacy of the investigation described to the District Court in Norman's affidavit of April 3, 1972.

The brief of the United States correctly states that Mr. Eric Schnapper, counsel for applicants, was not employed by the NAACP Legal Defense Fund between the date on which this action was filed and March 9, 1972. United States brief p. 35.

the exemption is that "they do not agree with the Attorney General's conclusion about what the public interest demands in this case," (United States brief p. 19), and that they merely wish to assert "a different theory of the public interest" (United States brief p. 29). This argument suggests, for otherwise it is unintelligible, that the United States consented to the exemption below because it thought an exemption was in the public interest. If that was the basis for the government's position in the District Court, it was patently erroneous, for section 4 of the Voting Rights Act gives the Attorney General no such discretion to approve exemptions "in the public interest." The United States can only consent to an exemption if it knows of no evidence of discrimination in the use of literacy tests; it cannot disregard such evidence or refuse to look for it because of its view of the public interest. The Attorney General did urge in 1970 that it would not be in the public interest to extend section 5 until 1975, but Congress rejected this view. The United States can no more undermine Congress's decision by repealing section 5 piecemeal through exemptions "in the public interest," than it could decline to carry out the express mandates of this Court. Compare *Cascade Natural Gas Corp. v. El Paso Natural Gas Company*, 376 U.S. 651 (1967).

Applicant's Interest

The United States argues that applicants' pending section 5 action does not give them a sufficient interest in the outcome of this case because it is "merely derivative." The United States does not explain the legal relevance or significance of labeling an action as "derivative" or even "merely derivative," and Rule 24 draws no distinction between intervention to protect "merely derivative" legal interests and intervention to protect other interests. To describe applicants' section 5 action as derivative is merely

to affirm applicants' claim that they are entitled to intervene as of right because they will be bound by the result in this case. As the United States urged in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, "The claim to intervention of right is obviously strongest where the applicant seeks to protect a property interest or a *cause of action*." (Brief of appellee in No. 4, 1966 Term, p. 61) (Emphasis added). The thrust of the United States' argument appears to be that applicants' interest in the outcome of the case is "not different" from that of the Attorney General. (United States brief, pp. 25-28). But under Rule 24 an applicant's interest need not be different from that of the parties, but only a "direct, substantial, legally protectable interest in the proceedings." (United States brief, p. 24 n. 20).

New York's literacy test

New York urges that the differences in literacy rates between whites and non-whites, and the inferior education provided the latter, are irrelevant in this case because under New York's literacy test potential voters are exempted from the tests if they had completed more than 6 grades of school. (New York brief, p. 18). This allegation has no bearing on the propriety of intervention, but should be considered at a hearing on the merits of the exemption claim which has yet to be held in this case. The record, however, shows that the proportion of non-whites who had completed less than 5 years of school was between 3.3 and 14.3 times higher than the corresponding rate among whites. (Pp. 83a-86a). The proportion of children between 7 and 13 who had dropped out of school has been higher among non-whites than among whites for half a century. (P. 80a). Substantially more non-white than white children have been more than one grade behind in

school. (P. 81a). This situation is not comparable to that in Gaston County (see New York brief p. 18), it is far worse.²

Timeliness of the New York action

Appellees make repeated reference to the fact that applicants' section 5 action in the Southern District of New York was filed on the same day as their motion to intervene. Brief of United States 8, 18, 25, 26; Brief of New York 14. Neither appellee, however, goes so far as to suggest that the section 5 action was not filed in good faith, would not have been filed but for the developments in this case, or would have had a different legal effect if filed earlier. The undisputed record in this case shows that the section 5 action dealt with two reapportionment laws, one of which had been enacted only 10 days earlier on March 28, 1972 (P. 58a). Counsel for applicants informed Justice Department attorneys on March 23 and 29, 1972, that they intended to file the section 5 action. On April 3, 1972, counsel was informed by a Justice Department attorney that the Department had no objection to the institution of such a section 5 action (Pp. 49a-50a). That action was commenced 4 days later. In the meantime, however, the

² The record in this case demonstrates conclusively the discrimination in the schools of New York over the last half century which gave rise to this difference in literacy rates. The literacy tests would also have discriminated on the basis of race even if the differences in literacy were not the result of state actions. This is the position taken by the United States during the oral argument in this Court of *Gaston County v. United States*:

- Q. I beg your pardon, Mr. Claiborne, but suppose that there had been no history of segregation in the public schools. Suppose that there was just a great many more Negro illiterates for the economic or social reasons that you have been talking about, would it nonetheless follow that you could not apply a literacy test?
- A. Mr. Justice, I would so argue if it were necessary.

United States took steps which necessarily doomed the section 5 action to which they had no objection by consenting to the exemption at issue. Applicants' right to intervene in this case should not be controlled by the fact that, in a race to the courthouse of which only the government was then aware, the United States filed its consent in the District Court for the District of Columbia three days before applicants filed their complaint in the Southern District of New York.

Timeliness of Motion to Intervene

Appellees maintain that the motion to intervene was properly denied because it was not timely as required by Rule 24. United States brief pp. 30-32, 41-46; New York brief pp. 8-12. Applicants urge that appellees must establish three things to prove that intervention is untimely, none of which has been shown in this case.

First, those opposing intervention must establish that intervention could have been obtained at an earlier date. In this case neither New York nor the United States are prepared to suggest that applicants would or should have been permitted to intervene prior to April 4, 1972.

Second, those opposing intervention must establish that the applicants knew at an earlier date than that on which intervention was sought that intervention was necessary to protect their interests. In this case neither New York nor the United States have urged that applicants or their counsel knew or were even "on notice" prior to April 4, 1972, that the United States would consent to an exemption or that the Department was conducting such an inadequate investigation as was first revealed on that date.

Applicants urge that where, as here, intervention is sought because of nonfeasance by the United States—its failure to defend the action and its failure to conduct an

investigation of the relevant facts—intervention cannot be sought until that nonfeasance occurs and becomes public knowledge. As the United States has cogently stated, “The existence of an adverse interest can ordinarily be determined in advance of trial. Bad faith, collusion or nonfeasance cannot. But these occur infrequently, and, where they are present, the proceedings are so tainted that justice requires that they not be accorded finality.” (Brief of appellee in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, October 1966 Term, No. 4, p. 30).

Third, those opposing intervention must establish that the applicants, by delaying their motion to intervene, had unreasonably prejudiced the rights of one of the parties. In this case appellees urge that the motion was untimely because, had it been granted in April of 1972, it would have prevented New York from obtaining an exemption at that time. Without such an exemption New York would have had to comply with section 5 before putting its new district lines in effect in the primary elections then scheduled for late in June, 1972. This argument is unpersuasive for several reasons.

Any threat of possible prejudice to New York arose not from the date when intervention was sought, but from the granting of intervention *at any time*. The only way in which New York could have obtained an exemption in April 1972 was if the United States, as the only defendant, consented to it. Had applicants been permitted to intervene on December 4, 1972, the day after this action was commenced, New York would have been prevented from receiving an exemption on April 13, 1972, as surely as if applicants' motion of April 7 had been granted. Thus the injury of which New York complains has nothing whatever to do with the timeliness of applicants' motion for intervention.

As of April, 1972, New York was undeniably in the awkward position of wanting to hold primary elections a mere two months later in new districts which had not been cleared by the Justice Department, a problem from which the state sought to extricate itself by obtaining an exemption from section 5. This problem, however, was the result of a long series of unexplained delays by the United States and New York. When the Cooper Amendment became law on June 22, 1970, both appellees knew that section 5 would apply to the three counties of New York and that any redistricting therein would have to be approved by the Justice Department prior to the 1972 primary elections, then a full *two years* away. The United States inexplicably waited nine months to publish in the Federal Register the required determinations applying section 5 to New York. New York, in turn, delayed another eight months before suing for an exemption. Even though time was by then clearly running out, New York agreed to let the United States take another three months to file its answer in this case. Appellants' brief p. 37. Similarly, the United States did not supply New York with corrected 1970 census data for its redistricting until October 15, 1971. New York then consumed three months enacting the boundaries of 210 assembly and senate districts, and an incomprehensibly longer five and one half months enacting the boundaries of 39 congressional districts. New York brief p. 10. Thus it came to pass that in April 1972, eighteen months after the passage of the Cooper Amendment, New York, with the consent of the United States, asked the District Court to exempt it from the Voting Rights Act without the least semblance of an adversary evidentiary hearing on the ground that such a hearing would unreasonably delay the proceedings. Applicants should not be penalized for the unwarranted delays by appellees prior to the motion for intervention.

To the difficulties created by appellees' delays in this case there was readily available a solution far less drastic than wholesale and permanent repeal of section 5's protections. The Justice Department regulations regarding section 5 submissions expressly provide for accelerated consideration of such submissions upon request under appropriate circumstances. 36 Fed. Reg. 18189-190.³ In this case, however, New York never sought to invoke this special procedure and the Department never suggested it do so. Nor did New York exercise its option to sue in the District Court for the District of Columbia for approval of its redistricting and ask that court for accelerated handling of such a case. Accelerated consideration of New York's reapportionment under section 5, not complete exemption from that section, was the appropriate remedy for the problems New York faced in early 1972, a remedy which New York neither exhausted nor even sought.

New York could also have asked the District Court to grant the motion to intervene only on condition that applicants agree not to press their New York action until after the completion of the 1972 elections. The District Court has an inherent power to set appropriate conditions in granting or denying motions under the Federal Rules of

³ § 51.22 Expedited consideration.

When a submitting authority demonstrates good cause for special expedited consideration to permit enforcement of a change affecting voting within the 60-day period following submission (good cause will, in general, only be found to exist with respect to changes made necessary by circumstances beyond the control of the enacting or submitting authorities), the Attorney General may consider the submission on an expedited basis. Prompt notice of the request for expedited consideration will be given to interested parties registered in accordance with § 51.13. When a decision not to object is made within the 60-day period following receipt of a submission which satisfies the requirements of § 51.10(a), the Attorney General may reexamine the submission if additional information comes to his attention during the remainder of the 60-day period which would require objection in accordance with § 51.19.

Civil Procedure. Compare *Dimick v. Schedt*, 293 U.S. 474 (1935); 6 Moore's Federal Practice ¶59.05[3]. If New York were correct in its contention that unconditional intervention would have reasonably prejudiced its interests, the imposition of such a condition would have constituted ample protection for the state.

Both New York and the United States urge that applicants should have sought intervention prior to April 7, 1972, in the light of an article in the *New York Times* on February 6, 1972 (p. 48, col. 3, United States Brief p. 42, New York Brief pp. 8-9). New York further asserts, for the first time in this case, that the American Civil Liberties Union had requested a copy of the complaint after this article appeared but declined to intervene "after studying the papers." (New York brief, p. 9).

The *New York Times* article and a letter from the Civil Liberties Union detailing its activities regarding this case are set out in the appendix hereto. The letter from the Civil Liberties Union states they concluded that intervention would be premature in February 1972 since the Justice Department had not yet determined its position. Although the state Attorney General's office was aware of their interest and had informed them that the Justice Department had yet to determine its position, that office did not inform the Civil Liberties Union when Justice did take a position or when judgment was entered in favor of New York. (Pp. 6ra-7ra). The Civil Liberties Union is not a party to this action, and any actual notice to them is not binding upon applicants.

The *Times* article does not state that the United States had consented to the exemption or had concluded there was no evidence of discrimination. Nor does the article suggest that the United States was conducting any investigation or was considering agreeing to the exemption.

After reporting an announcement on February 5, 1972 by the Attorney General that he had filed this action, the action having actually been commenced 2 months earlier, the article quotes several public officials and others as asserting this action had been "quietly filed" to "cover up voter discrimination." (P. 5ra). One of the state's critics was quoted as contending the literacy tests had been applied discriminatory, and "that people in black and Puerto Rican areas had been deterred from registering by various means, including a lack of Spanish-speaking inspectors" (P. 4ra). Two months after this article appeared the Justice Department filed an affidavit stating its investigation revealed "no allegation" of discrimination in the use of literacy tests. (P. 41a). The article quoted the Attorney General as stating he had sued in open court rather than using "an alternative procedure to ask the United States Attorney General for exemption." (P. 5ra). No such alternative procedure exists under the Voting Rights Act. The state Attorney General is further quoted as explaining that he had chosen not to invoke this non-existent alternative in order to avoid "charges of political influence."

In the face of Attorney General Katzenbach's testimony that intervention in exemption cases would be possible even under the restrictive pre-1966 version of Rule 24, the United States properly concedes that intervention in such cases is not precluded by section 4(a). United States brief, pp. 15 n. 13, 17, 21. The government, however, proceeds in the remainder of its brief to set standards for intervention which can never be met. The United States first makes it clear that no person could ever have the requisite interest to justify the intervention. The government concludes that neither protection of a section 5 action or retention of the benefits of coverage by the Act gives an applicant the needed type of interest in the outcome of an exemption

proceeding, and does not suggest any other interest which might suffice. Further the United States urges that neither its refusal to defend this action nor its failure to investigate the relevant facts constitute inadequate representation. By this standard the Attorney General could consent without investigation to exempt for each of the southern states covered by the 1965 Act without "inadequately representing" the black citizens affected. Similarly, while urging that intervention after the government's default is too late, the United States has not clearly relinquished its position in *Cascade Natural Gas*, *supra*, p. 8, that intervention before such non-feasance would be too early. If, as Attorney General Katzenbach testified, intervention is at times proper in section 4 cases, then there must be some conceivable person who has a sufficient interest in the case, some conceivable conduct which would constitute inadequate representation, and some time to seek intervention which is neither too early nor too late.

This case does not involve, as the United States has objected in other litigation, an attempt by applicants to "wrest control of the litigation" from the government. Compare Brief of Appellee in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, No. 4, October 1966 Term p. 31. The United States has adopted a position of neutrality on the merits of this case; the government has indicated on the one hand that it would not oppose judgment granting the exemption, and it has not indicated it would support such an exemption.⁴ The United States in the District Court did not object to applicants assuming control of the defense of this case. On appeal the United States is willing to defend the decision of the District Court, but

⁴ In its brief in *Apache County v. United States*, D.D.C. No. 292-66, p. 10, n. 5, the United States not only consented to an exemption and opposed intervention, but stated that if intervention were granted it would support plaintiff's claims on the merits.

the government does not go so far as to urge it would have been reversible error for the District Court to have permitted intervention. Under these circumstances applicants maintain that any presumption against intervention on the side of the United States suggested in *Cascade*, *Apache County*, or *Trbovich*, in all of which the government opposed intervention at the district court level, are inapplicable to this case.

Having earlier urged, as in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, that the courts in intervention cases should presume that the United States is fulfilling its responsibilities and trust that it is adequately representing affected members of the public, the government now advocates the contrary attitude for those private parties whose interests are involved. A private party must not presume or trust that the United States will inform him of litigation vital to his interests; rather, he must scrutinize daily the pages of all the newspapers in his area lest, as here, the government hold him "on notice" because of a brief article appearing on page 49 in only one of several papers on a single day. Compare United States brief pp. 10, 42, 46. If a private party learns of such litigation, he must not presume or trust that the United States will defend his interests. On the contrary, he must assume that his government will be guilty of collusion or nonfeasance and seek to intervene at once; if he puts his faith in the Department of Justice until and unless he has substantial reason to doubt the adequacy of their representation, he will be accused of "sitting by" and "doing nothing." United States brief, pp. 19, 42, 46. And if such a citizen or organization learns that the United States is conducting an investigation, they are not to assume the vast resources of the federal government will uncover relevant evidence, even evidence so readily obtainable as census reports (see

pp. 79a-87a), published court decisions (see pp. 78a-79a) or law review articles (see p. 82a), nor can they presume that the United States will remember legal theories advanced by it a year or two earlier (see Appellants' brief, pp. 30-36). Such parties must, simultaneous with the government's investigation, conduct their own investigation and present the results to the Justice Department or else be precluded from presenting evidence as intervenors. United States brief pp. 10, 19, 34, 36, 42, 46.⁵ We submit that interested parties, no less than the courts, are entitled to assume until shown otherwise that the United States is adequately representing both interested parties and the general public.

The United States takes great umbrage at applicants' allegations that its investigation was seriously inadequate and its consent erroneous, United States brief, pp. 18, 28, 32, 35, and characterizes applicants' contentions as "serious accusations". (United States brief, p. 32). But applicants did not seek to intervene, and have not pursued this appeal, to cast aspersions on anyone. Applicants recognize the salutary role the Department of Justice has played in protecting the civil rights of minority groups over many years and under several presidents. But the Department of Justice can be wrong. We submit that that is the case here. Applicants ask only that this Court reverse the judgment of the District Court and permit them to defend this action at a hearing on the merits.

⁵ Attorney General Katzenbach, by contrast, urged only that private parties bring evidence to the Attorney General if and *after* intervention were denied. United States brief p. 44, n. 44. New York and apparently the United States appear to question whether applicants ever "had any" evidence of discrimination. New York brief, p. 18, United States brief, p. 42. Applicants submit that the evidence in the record and presented to the District Court, including census data, court decisions, and several extensive studies of New York public schools is far more detailed and persuasive than that found sufficient to defeat an exemption in *Gaston County v. United States*.

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

Points and Authorities

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civil Action No. Civ. 2419-71

NEW YORK STATE, on behalf of New York, Bronx
and Kings Counties,

Plaintiff,

—against—

UNITED STATES OF AMERICA,

Defendant,

N.A.A.C.P., etc., et al.,

Applicants for Intervention.

The only previous case in which a private party sought to intervene to prevent a state or subdivision from winning exemption from the Voting Rights Act under section 4 thereof is *Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966).

The Court in *Apache County* set out two criterion the meeting of either of which would warrant such intervention. The first criterion was the pendency of an action by the applicants to enforce their individual or private rights, such as under 42 U.S.C. § 1983, on which the section 4 action would be legally binding. Such an action is now pending in the United States District Court for the South-

Points and Authorities

ern District of New York, *N.A.A.C.P., etc., et al. v. New York City Board of Elections*.

The second criterion is the failure to the Attorney General to discharge his responsibilities to protect the public interest and to investigate the relevant facts. The most important factor to be considered in judging whether literacy tests discriminate on the basis of race or color is whether there are differences in the literacy rates of whites and non-whites, particularly if they are due to unequal discriminatory public education. *Gaston County v. United States*, 395 U.S. 285 (1969). Applicants have alleged just such differences, inequality and discrimination in their proposed complaint,* but it appears from the affidavit of Mr. Norman that the United States at no time inquired whether similar facts to those found in *Gaston County* might have existed in New York at the time when today's illiterate non-white adults were children. The factual investigation vaguely described in Mr. Norman's affidavit falls far short of the thorough investigation in *Apache County* of possible discriminatory applications of literacy tests, and the actual investigations held in this case never included a request for information from applicants, whom the United States knew to be vitally interested in this matter.

This Court is required under the Voting Rights Act to make a determination of fact that New York has not within the last 10 years used any test or device with the purpose or the effect of denying the right to vote on account of race or color. The United States has declined to make a meaningful investigation into the relevant facts and will not present to this Court any information regarding such usages. Applicants for intervention should be permitted to

* This is a typographical error. The accompanying proposed pleading was technically an answer not a complaint, and it was so labeled.

Points and Authorities

intervene and to offer evidence of such usages to this Court so that it can properly discharge its statutory duties.

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Extract From New York Times Dated February 6, 1972

THE NEW YORK TIMES, SUNDAY, FEBRUARY 6, 1972

LEFKOWITZ ACTS TO BAR VOTING WATCH

State Attorney General Louis J. Lefkowitz said yesterday that he had moved in Federal Court in Washington to have the state exempted from potential Federal supervision over registration and voting in Manhattan, the Bronx and Brooklyn.

Mr. Lefkowitz said he had acted in line with procedures of the Voting Rights Act of 1970, and asserted that the exemption was needed to let the state go ahead with legislative and Congressional reapportionment laws and any other changes involving voting rights.

Discrimination Seen

The state's suit was attacked in a statement yesterday by the Rev. H. Carl McCall, chairman of the Citizens Voter Education Committee; Representative Herman Badillo and Borough Presidents Percy E. Sutton of Manhattan and Robert Abrams of the Bronx.

The four critics declared Federal intervention was needed to end what they called "gross and systematic discrimination in New York."

The 1970 law provides Federal supervision of voting procedures in any county in a state if fewer than 50 per cent of eligibles voted in the 1968 Presidential election. Such requirements have led to use of Federal registrars in the South.

Mr. McCall contended that the former literacy tests had been "applied discriminatorily" here and that people in black and Puerto Rican areas had been deterred from registering by various means, including a lack of Spanish-speaking inspectors.

Extract From New York Times Dated February 6, 1972

The four critics declared that the state petition for exemption had been "quietly filed" in what they called an attempt by the State Attorney General to "cover up voter discrimination."

Mr. Lefkowitz said the four "owe me a public apology." He said the suit had been filed in open court instead of an alternative procedure to ask the United States Attorney General for exemption, which he said might have led to charges of political influence.

He said that he was "ready to show that our literacy test was not used for the purpose of abridging anyone's right to vote for race or color" and that leaders in the city had made special efforts, including extra registration periods and places, to bring out prospective voters.

**Letter From New York Civil Liberties Union
Dated January 26, 1973**

NYCLU

New York Civil Liberties Union, 84 Fifth Avenue,
New York, N.Y. 10011. Telephone 924-7800

Burt Neuborne,
Staff Counsel

January 26, 1973

Eric Schnapper, Esq.
NAACP Legal Defense and Educational
Fund, Inc.
10 Columbus Circle
New York, New York 10019

Dear Mr. Schnapper:

I have received your letter dated January 19, 1973, in which you request information concerning the American Civil Liberties Union's receipt of a copy of the amended complaint in *NAACP v. New York*.

Shortly after the appearance of a story in the *New York Times* in February 1972, describing the filing of a suit by New York State to remove itself from the pre-clearance provisions of the Voting Rights Act, I telephoned Mr. George Zuckerman to request a copy of New York's complaint and the Justice Department's answering papers. Mr. Zuckerman immediately forwarded a copy of New York's amended complaint to me and informed me that the Justice Department had requested a lengthy adjournment to consider its position. Since the Justice Department had not yet determined its position in the matter, we deemed consideration of intervention premature.

Letter From New York Civil Liberties Union

Dated January 26, 1973

I heard nothing further concerning the matter, either from New York State or in the press, until May 1972, when the New York State Attorney General's office produced a copy of the unreported consent decree in *NAACP v. New York*, in response to my argument in *Socialist Labor Party v. Rockefeller*, 72 Civ. 2049 that certain modifications in the New York State Election Law had been enacted in violation of the pre-clearance requirements of the Voting Rights Act.

My office had no notice that the Justice Department consented to the entry of judgment in *NAACP v. New York*.

Sincerely yours,

/s/ BURT NEUBORNE

Burt Neuborne

cc: GEORGE ZUCKERMAN

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL ASSOCIATION FOR THE ADVANCE- MENT OF COLORED PEOPLE, NEW YORK CITY REGION OF NEW YORK CONFER- ENCE OF BRANCHES, ET AL. V. NEW YORK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

No. 72-129. Argued February 28, 1973—Decided June 21, 1973

Sections 4 and 5 of the Voting Rights Act of 1965, as amended, are designed to prohibit the use of tests or devices, or the alteration of voting qualifications or procedures, when the purpose or effect is to deprive a citizen of his right to vote. Sections 4 and 5 apply in any State or political subdivision thereof which the Attorney General determines maintained on November 1, 1964, or November 1, 1968, any "test or device," and with respect to which the Director of the Census Bureau determines that less than half the voting-age residents were registered, or that less than half voted in the presidential election of that November. These determinations are effective on publication and are not judicially reviewable. Publication suspends the effectiveness of the test or device, which may not then be utilized unless a three-judge District Court for the District of Columbia determines that no such test or device has been used during the 10 preceding years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." The section provides for direct appeal to the Supreme Court. The State or political subdivision may also institute an action pursuant to § 5 in the District Court for the District of Columbia, for a declaratory judgment that a proposed alteration in voting qualifications or procedures "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The statute also permits the change to be enforced without the court proceeding if it has been submitted to the Attorney General and he has not interposed an objection within

Syllabus

60 days. Neither the Attorney General's failure to object nor a § 5 declaratory judgment bars a subsequent private action to enjoin enforcement of the change. Such an action shall also be determined by a three-judge court and is appealable to the Supreme Court. The Attorney General, on July 31, 1970, filed with the Federal Register his determination that New York on November 1, 1968, maintained a test or device as defined in the Act. On March 27, 1971, the Federal Register published the Census Director's determination that in the counties of Bronx, Kings, and New York, "less than 50 per centum of the persons of voting age residing therein voted in the presidential election of November 1968." New York State filed an action on December 3, 1971, seeking a judgment declaring that during the preceding 10 years the three counties had not used the State's voting qualifications "for the purpose or with the effect of denying or abridging the right to vote on account of race or color" and that §§ 4 and 5 were thus inapplicable to the counties. Pursuant to stipulation, the United States filed its answer on March 10, 1972, alleging, *inter alia*, that it was without knowledge or information to form a belief as to the truth of New York's allegation that the literacy tests were not administered discriminatorily. On March 17, New York filed a motion for summary judgment, supported by affidavits, and on April 3 the United States formally consented to the entry of the declaratory judgment sought by the State. Appellants filed their motion to intervene on April 7. New York opposed the motion claiming that: it was untimely, as the suit had been pending for more than four months, it had been publicized in early February, and appellants did not deny that they knew the action was pending; appellants failed to allege appropriate supporting facts; no appellant claimed to be a victim of voting discrimination; appellants' interests were adequately represented by the United States; delay would prejudice impending elections; and appellants could raise discrimination issues in the state and federal courts. On April 13 the three-judge court denied the motion to intervene and granted summary judgment for New York. While the appeal was pending it was disclosed that the attorney who executed affidavits for appellants had not begun employment with appellant NAACP Legal Defense & Education Fund, Inc., until March 9, 1972, and that Justice Department attorneys met with two individual appellants in January 1972 during the course of their investigation. *Held:* •

1. The words "any appeal" in § 4 (a) encompass an appeal by a would-be, but unsuccessful, intervenor, and appellants' appeal properly lies to this Court. Pp. 7-10.

Syllabus

Affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which
BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ.,
joined. DOUGLAS and BRENNAN, JJ., filed dissenting opinions.
MARSHALL, J., took no part in the consideration or decision of the
case.

June 21, 1954

[Footnote 2 is on p. 5]

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-129

National Association for the
Advancement of Colored
People, etc., et al.,
Appellants,
v.
State of New York et al.

On Appeal from the
United States District
Court for the District
of Columbia.

[June 21, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This appeal from a three-judge district court for the District of Columbia comes to us pursuant to the direct-review provisions of § 4 (a) of the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, 438, as amended, 42 U. S. C. § 1973b (a).¹ The appellants² seek review of

¹ "To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. . . .

"An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the pro-

[Footnote 2 is on p. 2]

an order dated April 13, 1972, unaccompanied by any opinion, denying their motion to intervene² in a suit that had been instituted against the United States by the State of New York, on behalf of its counties of New York, Bronx, and Kings. New York's action was one for a judgment declaring that, during the 10 years preceding the filing of the suit, voter qualifications prescribed by the State had not been used by the three named counties "for the purpose or with the effect of denying or abridg-

visions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

"If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment."

² The appellants describe themselves, in their motion to intervene, as the National Association for the Advancement of Colored People, New York City Region of New York State Conference of Branches; your duly qualified black voters in Kings County, New York; and one duly qualified Puerto Rican voter in that county. Two of the individual appellants are also members of the New York State Assembly and another is a member of the New York State Senate. App. 44a.

³ The motion, App. 44a-47a, does not differentiate between intervention of right and permissive intervention, under subdivisions (a) and (b), respectively, of Rule 24 of the Federal Rules of Civil Procedure. Neither does it state that one, rather than the other, is claimed. At oral argument, counsel said that in the District Court the appellants sought intervention of right. Tr. of Oral Arg. 8. In this Court appellants suggest that they were also entitled to permissive intervention. Tr. of Oral Arg. 9; Brief for Appellants 26 n. 39. In view of our ruling on the issue of timeliness, we make no point of the distinction between the two types of intervention.

ing the right to vote on account of race or color," within the language and meaning of § 4 (a), and that the provisions of §§ 4 and 5 of the Act, as amended, 42 U. S. C. §§ 1973b and 1973c, are, therefore, inapplicable to the three counties.

In addition to denying the appellants' motion to intervene, the District Court, by the same order, granted New York's motion for summary judgment. This was based upon a formal consent by the Assistant Attorney General in charge of the Civil Rights Division, on behalf of the United States, consistent with the Government's answer theretofore filed, "to the entry of a declaratory judgment under Section 4 (a) of the Voting Rights Act of 1965 (42 U. S. C. 1973b (a)), " App. 39a. The consent was supported by an accompanying affidavit reciting, "I conclude, on behalf of the Acting Attorney General that there is no reason to believe that a literacy test has been used in the past 10 years in the counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, except for isolated instances which have been substantially corrected and which, under present practice cannot reoccur." App. 42a-43a.

Appellants contend here that their motion to intervene should have been granted because (1) the United States unjustifiably declined to oppose New York's motion for summary judgment; (2) the appellants had initiated other litigation in the United States District Court for the Southern District of New York to compel compliance with §§ 4 and 5 of the Act; and (3) the appellants possessed "substantial documentary evidence," Juris. Statement 7, to offer in opposition to the entry of the declaratory judgment.

Faced with the initial question whether this Court has jurisdiction, on direct appeal, to review the denial of the appellants' motion to intervene, we postponed

determination of that issue to the hearing of the case on the merits. 409 U. S. 978 (1972).

I

Section 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973,¹ clearly indicates that the purpose of the Act is to assist in the effectuation of the Fifteenth Amendment, even though that Amendment is self-executing, and to insure that no citizen's right to vote is denied or abridged on account of race or color. *South Carolina v. Katzenbach*, 383 U. S. 301 (1966); *Apache County v. United States*, 256 F. Supp. 903 (DC 1966). Sections 4 and 5, 42 U. S. C. §§ 1973b and 1973c, are designed to prohibit the use of tests or devices, or the alteration of voting qualifications or procedures, when the effect is to deprive a citizen of his right to vote. Section 4 (c) defines the phrase "test or device" to mean

"any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 42 U. S. C. § 1973b (c).

Section 4 (b), as amended, now applies in any State or in any political subdivision of a State which the Attorney General determines maintained on November 1, 1964, or November 1, 1968, any "test or device," and with respect to which the Director of the Bureau of the Census de-

¹ "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

termines that less than half the residents of voting age there were registered on the specified date, or that less than half of such persons voted in the presidential election of that November. These determinations are effective upon publication in the Federal Register and are not reviewable in any court. 42 U. S. C. § 1973b (b).

The prescribed publication in the Federal Register suspends the effectiveness of the test or device, and it may not then be utilized unless a three-judge district court for the District of Columbia determines, by declaratory judgment, that no such test or device has been used during the 10 years preceding the filing of the action "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." § 4 (a); 42 U. S. C. § 1973b (a). The same section states that "any appeal shall lie to the Supreme Court." And the District Court "shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color."

Section 5, 42 U. S. C. § 1973c, applies whenever a State or political subdivision with respect to which a determination has been made under § 4 (b) "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on November 1, 1964, or November 1, 1968.⁵ The state or political subdivision may then institute an action in the United States District Court for the District of

⁵In *Georgia v. United States*, — U. S. — (1973), the Court held that a State's reapportionment plan, which has the potential for diluting Negro voting power, is a "standard, practice, or procedure with respect to voting," within the meaning of § 5 of the Act. See *Allen v. State Board of Elections*, 393 U. S. 544 (1969).

Columbia for a declaratory judgment that what was done "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Unless and until the court enters such judgment "no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure." The statute contains a proviso, however, that the change may be enforced without the court proceeding if it has been submitted to the Attorney General of the United States and he "has not interposed an objection within sixty days after such submission." Neither the Attorney General's failure to object nor a declaratory judgment entered under § 5 shall bar a subsequent action by a private party to enjoin enforcement of the change. Here again, the action shall be determined by a three-judge court "and any appeal shall lie to the Supreme Court."

II

On July 31, 1970, the Attorney General filed with the Federal Register his determination that New York on November 1, 1968, maintained a test or device as defined in § 4 (c) of the Act. This was published the following day. 35 Fed. Reg. 12354. On March 27, 1971, there was published in the Federal Register the determination by the Director of the Bureau of the Census that in the counties of Bronx, Kings, and New York, in the State of New York, "less than 50 per centum of the persons of voting age residing therein voted in the presidential election of November 1968." 36 Fed. Reg. 5809.

The present action was instituted by the State of New York with the filing of its original complaint on December 3, 1971, in the United States District Court for the District of Columbia. The appellants contend that the District Court's order denying them intervention in that

action is directly appealable to this Court under § 4 (a) of the Act.

The United States "substantially" agrees that this Court has jurisdiction to review on direct appeal the denial of intervention in an action of this kind.^{*} Brief for the United States 21 n. 15. New York suggests that the appeal should be dismissed because the appellants have not established intervention of right and have not demonstrated an abuse of discretion by the District Court in denying permissive intervention. Brief for Appellee 22-23. We must determine for ourselves, of course, the scope of our jurisdiction, since "jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer." *Neirbo Co. v. Bethlehem Corp.*, 308 U. S. 165, 167 (1939); *Mitchell v. Maurer*, 293 U. S. 237, 244 (1934).

The jurisdictional issue is simply phrased: whether "any appeal," within the language of the second paragraph of § 4 (a), includes an appeal by a would-be, but unsuccessful, intervenor. Certainly, the words "any appeal" are subject to broad construction; they could be said to include review of any meaningful judicial determination made in the progress of the § 4 lawsuit. That Congress intended a broad meaning is apparent from its expressed concern that voting restraints on account of race or color should be removed as quickly as possible in order to "open the door to the exercise of constitutional rights conferred almost a century ago." H. R. Rep. No. 439, 89th Cong., 1st Sess., 11 (1965). See S. Rep. 162, pt. 3, 89th Cong., 1st Sess., 6-7 (1965). Indeed, the Voting Rights Act of 1965 was an addition

^{*} But see Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 90-91 (1965).

to, and buttressed, § 2004 of the Revised Statutes, as that section had been amended by the respective Civil Rights Acts of 1957, 1960, and 1964, 71 Stat. 637, 74 Stat. 90, and 78 Stat. 241, codified as 42 U. S. C. § 1971. When the 1965 Act was under consideration by the Congress, § 1971 (c) already empowered the Attorney General to institute a civil action to protect the right to vote from deprivation because of race or color or from interference by threat, coercion, or intimidation. Section 1971 (g) further provided that, in such a suit, the Attorney General could request a three-judge court, and "it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date . . . and to cause the case to be in every way expedited." Further, an appeal from the final judgment of that court was to the Supreme Court.

Despite this existing statutory provision designed to hasten the removal of barriers to the right to vote, the Congress determined, in 1965, that the enforcement of the voting rights statutes "has encountered serious obstacles in various regions of the country," and progress "has been painfully slow, in part because of the intransigence of State and local officials and repeated delays in the judicial process." H. R. Rep. No. 439, *supra*, at 9. See *South Carolina v. Katzenbach*, 383 U. S. 301, 309-315 (1966), and *Allen v. State Board of Elections*, 393 U. S. 544, 556 n. 21 (1969). Congress thus produced the Voting Rights Act of 1965 in response to this recognized problem and provided in that Act that "any appeal" in a § 4 (a) three-judge proceeding shall lie to this Court. This contrasts with the language in the earlier theretofore existing statute providing for an appeal here only "from the final judgment" of the three-judge court. § 1971 (g). The broader language of § 4 (a), when viewed in the light of Congress' concern about hastening the resolution of suits involving voting rights, see *Apache*

County v. United States, 256 F. Supp., at 907, prompts us to conclude that the unsuccessful intervenor's § 4 (a) appeal is directly here and not to the Court of Appeals.

This conclusion is not without other relevant statutory precedent. It has long been settled that an unsuccessful intervenor in a government-initiated civil antitrust action may appeal directly to this Court under § 2 of the Expediting Act, 15 U. S. C. § 29.⁷ *United States v. California Canneries*, 279 U. S. 553, 559 (1929); *Sutphen Estates v. United States*, 342 U. S. 19, 20 (1951); *Cascade Natural Gas v. El Paso Natural Gas*, 386 U. S. 129, 132 (1967).

Earlier this Term, in *Tidewater Oil Co. v. United States*, 409 U. S. 151 (1972), we held that § 2 of the Expediting Act lodged in this Court exclusive appellate jurisdiction over interlocutory, as well as final, orders in government civil antitrust cases. In so holding, we emphasized Congress' determination "to speed appellate review." *Id.*, at 155. As we have noted above, Congress has expressed a similar need for speed in adjudicating voting rights cases. We could not justify dissimilar treatment to an unsuccessful intervenor under the parallel § 4 (a) of the Civil Rights Act.

Further support for this result is supplied when one contrasts the specific appeal provision of § 4 (a) with 28 U. S. C. § 1253,⁸ allowing for a direct appeal to this Court from an order granting or denying an interlocutory or permanent injunction "in any civil action, suit or

⁷ "In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

⁸ "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

proceeding required by any Act of Congress to be heard and determined by a district court of three judges." That section provides that "any party" may appeal here except "as otherwise provided by law." Section 4 (a) does not incorporate or refer to § 1253. The former relates to "any appeal"; the latter speaks only of "any party." The difference is obvious, and the broader purport of Congress under § 4 (a) is manifest.

We conclude, therefore, that this Court has jurisdiction, on direct appeal by one denied intervention in a § 4 (a) action, to determine whether the District Court erred in denying the motion to intervene.

III

As originally enacted, §§ 4 and 5 of the Voting Rights Act of 1965 related only to a period of five preceding years, to a test or device in effect on November 1, 1964, to a paucity of persons registered on that date, and to a paucity of voters in the presidential election of 1964. 79 Stat. 438-439. In 1970, however, Congress enacted the Voting Rights Act Amendments of 1970. Pub. L. 91-285, 84 Stat. 314. This new legislation, among other things, related §§ 4 and 5 to ten, rather than five, preceding years and, in addition to the November 1, 1964, date and the presidential election of that year, to November 1, 1968, and the 1968 election. Also, the 1970 Act suspended the use of any test or device "in any Federal, State, or local election" prior to August 6, 1975, without regard to whether a determination has been made that § 4 covered a particular state or political subdivision. 42 U. S. C. § 1973aa. See *Oregon v. Mitchell*, 400 U. S. 112, 131-132 (1970) (opinion of Mr. Justice Black).

The three New York counties that the present litigation concerns were not covered by §§ 4 and 5 of the original 1965 Act. They became subject thereto because of the provisions of the 1970 Act and the respective

published determinations, hereinabove described, of the Attorney General and the Director of the Bureau of the Census. Indeed, it is clear that the three counties were a definite target of the 1970 amendments. See, for example, 116 Cong. Rec. 6659 (1970) (remarks of Sen. Cooper); *id.*, 20161 and 20165 (remarks of Cong. Celler and Albert, respectively).

It was in December 1971, during the pendency of state legislative proceedings for the redrafting of congressional and state senate and assembly district lines,⁹ that the State of New York filed its complaint in the present action.¹⁰ The amended complaint, filed 13 days later,

⁹ Although the Director of the Bureau of the Census determined, on March 15, 1971, that less than 50% of the persons of voting age residing in the three named New York counties voted in the presidential election of November 1968, it was stated on behalf of the appellees in oral argument that a complete set of census statistics was not available to the State of New York until October 15, 1971. Tr. of Oral Arg. 41. The appellants, however, in the complaint filed by them in the United States District Court for the Southern District of New York in their § 5 suit against the New York City Board of Elections and others, No. 72 Civ. 1460, alleged that census information on which reapportionment was based was made available to the State no later than September 1, 1971. App. 59a. We do not know which of these dates is correct. It is clear, in any event, that census data for the redrawing of congressional and legislative district lines was not available to New York until the fall of 1971.

¹⁰ New York claims that the primary reason for filing its § 4 (a) suit was to insure that the imminent 1972 elections would be held on the basis of district lines drawn according to population figures from the 1970 census. It is said that the lateness in obtaining the figures, see n. 9, *supra*, and the concomitant impossibility of redrawing lines before early 1972 made it highly unlikely that the State would be able to obtain from the Attorney General of the United States any § 5 clearance for the redistricting legislation prior to April 4, the first day for circulating nominating petitions for the June 20 primary. Thus, by obtaining a favorable result in a § 4 (a) suit, New York could bypass the submission of its redistricting plan to the Attorney General. Tr. of Oral Arg. 41-42.

alleged that certain of the State's qualifications for registration and voting, prescribed by New York's Constitution, Art. II, § 1, and by its Election Law, §§ 150 and 168, as amended (the ability to read and write English, the administration of a literacy test, and the presentation of evidence of literacy in lieu of the test), had not been used during the preceding 10 years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color," App. 6a; that the State's literacy requirements were suspended in 1970 and remained suspended; that after enactment of the 1965 Act, the New York City Board of Elections provided English-Spanish affidavits to be executed in lieu of a diploma or certificate in conformity with the requirements of the Act; and that, beginning in 1964 and continuing through 1971, with the exception of 1967, there were voter registration drives every summer designed to increase the number of registered voters in the three named counties.

New York and the United States stipulated that the Government could file its answer or other pleading by March 10, 1972. The answer was filed on that day. The Government therein admitted that English-Spanish affidavits were provided by the City Board of Elections but averred, on information and belief, that such affidavits were not so provided prior to 1967. The answer also alleged that the United States was without knowledge or information sufficient to form a belief as to the truth of the plaintiff's allegation that the literacy tests were administered with no intention or effect to abridge or deny the right to vote on the basis of race or color.

On March 17 New York filed its motion for summary judgment. This was supported by affidavits from the Administrator for the Board of Elections in the City of New York "which includes the counties of New York, Bronx and Kings," the Chief of the Bureau of Elementary and Secondary Educational Testing of the New York

State Education Department, and the respective Chief Clerks of the New York, Bronx, and Brooklyn Borough Offices of the New York City Board of Elections. App. 15a-32a. These affidavits stated that those instances where the suspension of literary tests had been ignored or overlooked by election officials were isolated and that steps had been taken to resolve that problem. The affidavits also stated that since 1964, with the exception of 1967, the Board of Elections had conducted summer voter registration drives directed particularly to high density black population areas. In its memorandum, filed with the District Court, in support of its motion, New York presented a history of its use of literacy tests¹¹ and concluded, "since it was never the practice of administering the tests to discriminate against any person on account of race or color, and since the filing requirements of the Voting Rights Act are leading to delays which may well disrupt the political process in New York, this action for declaratory judgment has been brought." Memorandum 4-5. See *South Carolina v. Katzenbach*, 383 U. S., at 332.

Two and one-half weeks later, on April 3, the United States filed its formal consent, hereinabove described, to the entry of the declaratory judgment for which New York had moved. The accompanying affidavit of the Assistant Attorney General stated that the Department of Justice had conducted "an investigation which consisted of examination of registration records in selected

¹¹ The New York Election Law, § 168, as amended, provides that "a new voter may present as evidence of literacy" a certificate that he has completed the sixth grade of an approved elementary school or of a school "accredited by the Commonwealth of Puerto Rico in which school instruction is carried on predominately in the English language." On July 28, 1966, the State's Attorney General issued an opinion to the effect that New York may not require literacy in English from persons educated in Puerto Rico. Opinions of the Attorney General, 1966, 121, 123.

precincts in each covered county, interviews of certain election and registration officials and interviews of persons familiar with the registration activity in black and Puerto Rican neighborhoods in those counties." App. 40a. The Assistant Attorney General then reached the conclusion, app. 42a-43a, quoted *ante*, p. 3.

Appellants' motion to intervene was filed April 7. Appellants asserted that if New York were successful in the present action, the appellants would be deprived of the protections afforded by §§ 4 and 5; that they "would be legally bound" thereby in their simultaneously filed § 5 action in the Southern District of New York; and that the latter action "would necessarily fail." App. 45a.¹² The appellants also alleged that the § 5 suit asserted that New York "has gerrymandered Assembly, Senatorial and Congressional districts in Kings, Bronx and New York counties so that, on purpose and in effect, the right to vote will be denied on account of race or color." *Ibid*. Thus, it was said, the disposition of the present suit might impair or impede the appellants' ability to protect their interests in registering to vote, voting, and seeking public office. App. 46a. It was further claimed that during the preceding three weeks attorneys in the

¹² While the present case was pending in the District Court, the New York Legislature on January 14, 1972, completed its work of redrawing assembly and senate district lines and enacted legislation altering those boundaries. Laws 1972, c. 11. On January 24, the State's Attorney General submitted the redistricting plan to the Attorney General of the United States pursuant to § 5 of the 1965 Act, as amended, 42 U. S. C. § 1973c. On March 14, three days before New York's motion for summary judgment was filed, the Federal Attorney General rejected New York's submission on the ground that it was lacking in information required by the applicable regulations set forth, at 36 Fed. Reg. 18186-18190 (1971). On March 28 the New York Legislature enacted legislation redefining the boundaries of the State's congressional districts. Laws 1972, c. 76. The congressional changes were not submitted for approval under § 5.

Department of Justice thrice had represented to appellants' counsel that the United States would oppose New York's motion for summary judgment." "At no time did any of the three Justice Department attorneys . . . inquire of counsel for [appellants] whether he or any of the [appellants] had information or evidence which would support the government's alleged position that sections 4 and 5 of the Voting Rights Act should continue to be applied to Kings, Bronx and New York counties." *Ibid.*

There was also filed an affidavit of Eric Schnapper, one of the attorneys for the appellants. This repeated the allegations contained in the motion to intervene and also asserted that on March 21 the affiant advised a Department of Justice attorney that when the New York redistricting laws were submitted to the Department, he wished to submit material and arguments in opposition to their approval; that on March 23 he was advised by another Department attorney that papers were being prepared in opposition to New York's motion for summary judgment; that he informed the attorney that the appellants were considering the institution of an action in the Southern District of New York; that on April 3 he was advised by the Department of Justice that it would have no objection to the institution of the New York suit; and that in the afternoon of April 5 he was informed by telephone for the first time that two days earlier the United States had consented to New York's motion for summary judgment. App. 48a-51a.

With the motion to intervene the appellants filed a proposed answer to appellee's amended complaint and a brief memorandum of points and authorities. The

¹³The United States takes the position "that the statements of appellants' counsel are not an accurate representation of the conversations between him and these government attorneys." Brief for the United States 47.

latter suggested the failure of the Attorney General "to investigate the relevant facts," namely, "whether there are differences in the literacy rates of whites and non-whites, particularly if they are do [sic] to unequal or discriminatory public education. *Gaston County v. United States*, 395 U. S. 285 (1969)." This suggestion was also made in the proposed answer. App. 65a-66a. The United States took no position with respect to the appellants' motion to intervene. New York opposed the motion on six grounds. The first was untimeliness in that the suit had been pending for more than four months, an article about it had appeared in early February in *The New York Times*, and the appellants did not deny that they had knowledge of the pendency of the action. The second was failure to allege appropriate supporting facts. The third was the lack of a requisite interest in that none of the appellants asserted he was a victim of discriminatory application of the literacy test; rather, the motion to intervene was subordinate to the appellants' real interest in invalidating New York's reapportionment of its assembly, senate, and congressional districts, as evidenced by the institution of their action in the Southern District of New York. The fourth was adequate representation of the appellants' interest by the United States. The fifth was that delay in the granting of the motion for summary judgment would prejudice New York and jeopardize the impending primary elections for offices of Assembly, Senate, and Congress, as well as for delegates to the upcoming Democratic National Convention. The sixth was that the appellants and others who claimed discrimination still could raise those issues in the state and federal courts of New York. Plaintiff's Memorandum of Law in Opposition to The Motion to Intervene 1-8. Like reasons were asserted in a supporting affidavit of an Assistant New York Attorney General. App. 67a-70a.

On April 13 the three-judge court entered its order denying the appellants' motion to intervene and granting summary judgment for New York. App. 71a-72a.

On April 24 the appellants filed a Motion to Alter Judgment on the ground, among others, that their motion to intervene was timely since neither the appellants nor their counsel knew of the § 4 (a) action until March 21.¹⁴ The appellants now asserted that evidence was available to demonstrate that in the three counties education afforded nonwhite children by New York was substantially inferior to that afforded white children and that "this difference resulted in disparities in white and non-white illiteracy rates among persons otherwise eligible to vote in those counties during the 10 years prior to the filing of the instant action." App. 73a-74a. Thus "a full evidentiary hearing is required before making any finding of fact as to whether plaintiff's literacy tests discriminated on the basis of race." Finally, the appellants asserted that the District Court "should not have approved the consent judgment desired by plaintiff and defendant without first soliciting the intervention of responsible interested parties and requiring the United

¹⁴ Mr. Schnapper filed a further affidavit on April 24, 1972. In it he stated (1) that prior to March 21, 1972, he had no knowledge whatever of the commencement, pendency or existence of the § 4 (a) action; (2) that throughout December 1971 and January and February 1972 he was in New Hampshire and the daily paper he regularly read there did not carry any story about the present suit; (3) that to the best of his knowledge neither co-counsel nor any of the appellants knew of the suit prior to March 21; (4) that he did not receive New York's memorandum in opposition to the motion to intervene until April 13, after the District Court already had ruled on the motion; (5) that he did not learn of the consent by the United States to the entry of judgment until April 5; and (6) that the motion to intervene, as well as the papers in the § 5 action in the Southern District of New York were drafted "throughout the night of April 6-7." App. 91a-92a.

States to undertake a more thorough investigation of the relevant facts." *Ibid.*

The District Court promptly denied the Motion to Alter Judgment. App. 117a.

Subsequently, while the appeal was pending in this Court, two additional facts came to light and are authorized by the parties for our consideration. The first is that Mr. Schnapper, who executed the above described affidavits, did not begin his employment as an attorney with the NAACP Legal Defense and Education Fund, Inc., until March 9, 1972. The second is that "Justice Department attorneys met with appellants Stewart and Fortune in January 1972 during the course of their investigation; although the Justice Department attorneys recall informing Stewart and Fortune that this case was pending, neither Stewart nor Fortune can remember being so informed." Reply Brief for Appellants 3 n. 1; Brief for the United States 36.

IV

The foregoing detailed recital of the facts and of the history of the case is necessary because of the discretionary nature of the District Court's order we are called upon to review. Our task is to determine whether, upon the facts available to it at that time, the court erred in denying the appellants' motion to intervene.

Intervention in a federal court suit is governed by Rule 24 of the Federal Rules of Civil Procedure.¹⁵ Whether intervention be claimed of right or as permis-

¹⁵

"Rule 24.—INTERVENTION

"(a) Intervention of right.

"Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to pro-

sive, it is at once apparent, from the initial words of both Rule 24 (a) and Rule 24 (b), that the application must be "timely." If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness.¹⁶ Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances.¹⁷ And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.¹⁸

fect that interest, unless the applicant's interest is adequately represented by existing parties.

"(b) Permissive intervention.

"Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

¹⁶ *Iowa State University Research Foundation v. Honeywell, Inc.*, 459 F. 2d 447, 449 (CA8 1972); *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F. 2d 1103, 1115 (CA5 1970); *Lumbermens Mutual Casualty Co. v. Rhodes*, 403 F. 2d 2, 5 (CA10), cert. denied, 394 U. S. 965 (1969); *Kozak v. Wells*, 278 F. 2d 104, 108-109 (CA8 1960); 7A C. Wright and A. Miller, *Federal Practice and Procedure*, § 1916 (1972); 3B Moore's *Federal Practice*, ¶ 24.13 [1] (2d. ed. 1969).

¹⁷ *Iowa State University Research Foundation v. Honeywell, Inc.*, 459 F. 2d, at 449; *Smith Petroleum Service v. Monsanto Chemical Co.*, 420 F. 2d, at 1115; *Kozak v. Wells*, 278 F. 2d, at 109.

¹⁸ *McDonald v. E. J. Lavino Co.*, 430 F. 2d 1065, 1071 (CA5 1970);

With these accepted principles in mind, we readily conclude that the District Court's denial of the appellants' motion to intervene was proper because of the motion's untimeliness, and that the denial was not an abuse of the court's discretion:

1. The court could reasonably have concluded that appellants knew or should have known of the pendency of the § 4 (a) action because of an informative February article in *The New York Times* discussing the controversial aspect of the suit;¹⁰ public comment by community leaders; the size and astuteness of the membership and staff of the organizational appellant; and the questioning of two of the individual appellants themselves by Department of Justice attorneys investigating the use of literacy tests in New York.

2. We, however, need not confine our evaluation of abuse of discretion to the facts just mentioned, for the record amply demonstrates that appellants failed to protect their interest in a timely fashion after March 21, 1972, the date they allegedly were first informed of the pendency of the action. At that point, the suit was over three months old and had reached a critical stage. The United States had answered New York's complaint on March 10 and in that answer had clearly indicated that it was without knowledge or information sufficient to

Lumbermens Mutual Casualty Co. v. Rhodes, 403 F. 2d, at 5; 3B Moore's Federal Practice, ¶ 24.13, at p. 24-524.

¹⁰ *The New York Times*, February 6, 1972, p. 48. This was the only news article on the page. Its three-column headline read, "Lefkowitz Acts to Bar Voting Watch." The article recited that New York's Attorney General "had moved in Federal Court in Washington to have the state exempted from potential Federal supervision over registration and voting" in the three counties. It mentioned an attack upon the suit by the Chairman of the Citizens Voter Education Committee, a Congressman, and the Manhattan and Bronx Borough Presidents, and described the Attorney General's reply to that attack.

form a belief as to the truth of New York's allegation that the State's literacy tests were administered without regard to race or color. App. 13a. New York, in reliance upon this answer, then filed its motion for summary judgment. The only step remaining was for the United States either to oppose or to consent to the entry of summary judgment. This was the status of the suit at the time the appellants concede they were aware of its existence. It was obvious that there was a strong likelihood that the United States would consent to the entry of judgment since its answer revealed that it was without information with which it could oppose the motion for summary judgment. Thus, it was incumbent upon the appellants, at that stage of the proceedings, to take immediate affirmative steps to protect their interests either by supplying the Department of Justice with any information they possessed concerning the employment of literacy tests in a way designed to deny New York citizens of the right to vote on account of race or color, or by presenting that information to the District Court itself by way of an immediate motion to intervene.²⁰ Appellants failed to take either of these affirmative steps. They chose, rather, to rely on representations said to have been made by Department of Justice attorneys during the course of telephone conversations. The content of the representations allegedly made by the attorneys is a matter of dispute. Brief for the United States 46-47. Indeed, it appears from the affidavit filed by appellants' counsel in support of the Motion to Alter Judgment that appellants were not preparing, prior to

²⁰ See Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 91-93.

Appellants at oral argument acknowledged that they were not precluded from seeking intervention prior to the date on which the United States filed its consent to the entry of summary judgment. Tr. of Oral Arg. 18-19.

the "night of April 6-7," to file a motion to intervene or even to file their New York federal action seeking to enjoin the 1972 elections. See n. 14, *supra*.

3. It is also apparent that there were no unusual circumstances warranting intervention since (a) no appellant alleged an injury, personal to him, resulting from the discriminatory use of a literacy test, (b) appellants' claim of inadequate representation by the United States was unsubstantiated, (c) appellants would not be foreclosed from challenging congressional and state legislative redistricting plans on the grounds that they were the product of improper racial gerrymandering, cf. *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), and *Wright v. Rockefeller*, 376 U. S. 52 (1964), (d) appellants were free to renew their motion to intervene following the entry of summary judgment since the District Court was required, under § 4 (a) of the Act, 42 U. S. C. § 1973b (a), to retain jurisdiction for five years after judgment, and, (e) in any event, no citizen of New York could be denied the right to vote in the near future since all literacy tests have been suspended until August 6, 1975. 42 U. S. C. § 1973aa.

4. Finally, in view of the then rapidly approaching primary elections in New York and of the final date for filing nominating petitions to participate in those elections, the granting of a motion to intervene possessed the potential for seriously disrupting the State's electoral process with the result that primary and general elections would then have been based on population figures from the 1960 census and more than 10 years old.

We therefore conclude that the motion to intervene was untimely and that the District Court did not abuse its discretion in denying the appellants' motion. See *Apache County v. United States*, *supra*; *United States v. Paramount Pictures*, 333 F. Supp. 1100 (SDNY), *aff'd*

sub nom. Syufy Enterprises v. United States, 404 U. S. 802 (1971). This makes it unnecessary for us to consider whether other conditions for intervention under Rule 24 were satisfied.

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 72-129

National Association for the
Advancement of Colored
People, etc., et al.,
Appellants,
v.
State of New York et al.

On Appeal from the
United States District
Court for the District
of Columbia.

[June 21, 1973]

MR. JUSTICE DOUGLAS, dissenting.

When two mighty political agencies such as the Department of Justice in Washington, D. C., and the Attorney General of New York in Albany agree that there is no racial discrimination in voting in three New York counties although the historic record suggests it, it is time to take a careful look and not let this litigation be ended by an agreement between friendly political allies.

The 1970 Act was specifically aimed at New York—particularly Bronx, King, and New York counties. It was pointed out in the debates that under the earlier Act these counties were not included, that while in the 1964 election more than 50% of the voters were registered and more than 50% voted, in the 1968 election 50% were not registered or voting. 116 Cong. Rec. 6654, 6659. It was pointed out that New York's literacy requirement was enacted with the view of discriminating on the basis of race. 116 Cong. Rec. 6660. New York Blacks were illiterate because their education, if any, had been in second class schools elsewhere. 116 Cong. Rec. 6661. It was emphasized that wherever the Blacks had been educated it was unconstitutional to discriminate against them on the basis of race even though

illiterate. 116 Cong. Rec. 5533. The use of literacy tests in New York tended to deter Blacks from registering, it was said. 116 Cong. Rec. 5533. And it was pointed out that literacy tests had a greater impact on Blacks and other minorities than on any White because literacy was higher among Whites. 116 Cong. Rec. 5532-55.

In the face of this history the United States did not call one witness nor submit a single document nor make even a feeble protest to New York's claim that it was lily white. The United States has no defense to offer. The desultory way in which the United States acted is illustrated by the fact that although the Act requires the District Court to retain jurisdiction of the cause for five years, 42 U. S. C. § 1973 (b)(a), the United States did not even make the request. It capitulated completely. And yet the Black, the Americans of Puerto Rican ancestry, and other minorities victimized by illiteracy tests clamor in their way for representation. Only NAACP offers it in this case. The investigation made by the Department of Justice has all the earmarks of a whitewash.

The Attorney General had testified before Congress:*

"[I]t is clear that Negro voting in most Deep South Counties subject to both literacy test suspension and on-scene enrollment by Federal registrars is now *higher* than Negro vote participation in the ghettos of the two Northern cities—New York and Los Angeles—where literacy tests are still in use. In non-literacy test Northern jurisdictions like Chicago, Cleveland and Philadelphia, Negro registration and voting ratios are higher than in Los Angeles and [especially] New York. . . ."

*Hearings, Subcommittee of House Judiciary Committee on H. R. 4249, 91st Cong., 1st and 2d Sess. (1969), pp. 296-297.

Yet none of these assertions were given the District Court nor was any attempt made to develop evidence along these lines.

This suit by the New York to get an exemption for the three counties started on December 3, 1971. On March 10, 1972, the United States filed its answer and on March 17, 1972, New York moved for summary judgment. On March 21, 1972, NAACP was advised by the Department of Justice that the latter would oppose New York's motion for summary judgment. Out of the blue the Department of Justice on April 4, 1972, consented to the entry of a decree exempting the three New York counties from the Act. The motion to intervene was promptly filed April 7, 1972.

The answer filed by NAACP on April 7, 1972, alleges that the literacy test administered by New York deterred minorities from registering, that it was administered by whites, that social gerrymandering was so widespread and successful that minorities were discouraged from voting, that New York produced illiterate Blacks through operating inferior black schools—inferior in educational facilities, inferior in teachers, inferior in expenditures *per capita*.

It is assumed, of course, that the United States adequately represents the public interest in cases of this sort. But on the face of this record of transactions that the United States has approved or does not contest, it is clear that it does not adequately represent the public interest. Intervention as of right under Rule 24 (a)(2) should therefore be allowed. See *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U. S. 129, 135-136.

Here it is plainly evident that the United States is an eager and willing partner with its allies in New York to foreclose inquiry into barriers to minority voting. What the facts may produce, no one knows. All that is requested is a hearing on the merits. The fresh air

of publicity that only a fair and full trial in court can produce should be allowed to ventilate a case that has all the earmarks of a cozy arrangement to suppress the facts—evidence which, if proved, would be adequate as a basis for relief in a case from the South. See *Gaston County v. United States*, 395 U. S. 285. This evidence, if proved, should be equally adequate in the North.

SUPREME COURT OF THE UNITED STATES

No. 72-129

National Association for the
Advancement of Colored
People, etc., et al.,
Appellants,
v.

State of New York et al.

On Appeal from the
United States District
Court for the District
of Columbia.

[June 21, 1973]

MR. JUSTICE BRENNAN, dissenting.

In my view, the District Court erred in denying appellants' motion for leave to intervene in this suit under § 4 (a) of the Voting Rights Act of 1970, 42 U. S. C. § 1973b (a). The case plainly turns on its facts, and its impact on the development of principles governing intervention will doubtless be small. But what is ultimately at stake in this suit by New York to obtain an exemption under the Voting Rights Act is the applicability of the protections of the Act to 2.2 million minority group members residing in three New York counties. According to appellants, the total number of minority group members affected by all previous exemptions combined was less than 100,000.

At the same time that the District Court denied the motion to intervene, it granted the State's motion for summary judgment, thereby exempting these three counties from the coverage of the Act. The United States, defendant in the suit, consented to the entry of summary judgment. As a result, the contention that appellants were prepared to urge—namely, that the grant of an exemption would nullify the specific congressional intent to extend the protections of the Act to the class represented by appellants—was never laid before the Court.

In upholding the denial of leave to intervene, the Court reasons that appellants' motion, filed two days after the United States consented to a grant of summary judgment, was untimely. In the Court's view, appellants should have made their motion during the brief period between the filing of New York's motion for summary judgment and the announcement by the United States that it would not contest that motion. The Court states, with the benefit of hindsight, that it was

"obvious that there was a strong likelihood that the United States would consent to the entry of judgment since its answer revealed that it was without information with which it could oppose the motion for summary judgment. Thus, it was incumbent upon the appellants, at that stage of the proceedings, to take immediate affirmative steps to protect their interests either by supplying the Department of Justice with any information they possessed concerning the employment of literacy tests in a way designed to deny New York citizens of the right to vote on account of race or color, or by presenting that information to the District Court itself by way of an immediate motion to intervene." *Ante*, at 21.

The timeliness of a motion to intervene is determined not by reference to the date on which the suit began or the date on which the would-be intervenor learned that it was pending, but rather by reference to the date when the applicant learned that intervention was needed to protect its interests. See *Diaz v. Southern Drilling Corp.*, 427 F. 2d 1118, 1125 (CA5 1970); cf. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129 (1967). Prior to the announcement that the United States would not contest the motion for summary judgment,

ment, appellants could not have known that intervention was needed to protect their interests and the interests of the class they represent. In an affidavit filed in connection with the motion to intervene, appellants' attorney stated that he had been advised by three different Justice Department attorneys that the United States would oppose New York's motion for summary judgment. Affidavit of Eric Schnapper, App. 48a-51a. The Court suggests that the contents of the representations made by these attorneys is "a matter of dispute." *Ante*, at 21. The matter was not in dispute, however, at the time the affidavit was filed,* nor did it become the subject of dispute until five months later when the Government filed in this Court its Motion to Dismiss or Affirm. Even then, the United States did not deny that appellants had been offered certain assurances by Government attorneys, but stated only that the affidavit was not "an accurate representation of the conversations between counsel for appellants and attorneys for the government." Motion to Dismiss or Affirm, Sept. 13, 1972, at 4 n. 3.

Thus, the record before the District Court indicated reasonable reliance on the Government's assurances that the suit would not be settled. And appellants did move to intervene within two days of learning that they could no longer rely on the Government to protect their interests. On that record, the District Court was obligated to conclude that the motion was timely filed. Since the allegation of untimeliness was, in my view, the only non-frivolous objection to the motion, the District Court's denial of the motion was unquestionably erroneous. I dissent.

*The United States filed no response to appellants' motion to intervene and did not otherwise object to the motion." Brief for the United States 10.